IN THE

Supreme Court of the United States

October Term, 1976.

No. 76-1356

MERCEDES-BENZ OF NORTH AMERICA, INC.
and DAIMLER-BENZ A. G.,

Petitioners,

v.

JULES LINK and SOLOMON KATZ, on Behalf of Themselves
and All Others Similarly Situated,

Respondents.

PETITION FOR A WRIT OF STATUTORY CERTIORARI, AND, IN THE ALTERNATIVE, FOR A WRIT OF COMMON LAW CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AND MOTION FOR LEAVE TO FILE PETITION.

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DATED: April 4, 1977.

International Printing Co., 711 So. 50th St., Phila., Pa. 19143 — Tel. (215) 727-8711

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v.

JULES LINK and SOLOMON KATZ, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,
Respondents.

—

MOTION FOR LEAVE TO FILE PETITION FOR A WRIT OF COMMON LAW CERTIORARI.

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Now come Mercedes Benz of North America, Inc. ("Mercedes") and Daimler Benz A. G. ("Daimler") and move for leave to file the annexed petition for writ of certiorari pursuant to the All Writs Act (28 U. S. C. § 1651) (*See, In re 620 Church Street Bldg. Corp.*, 299 U. S. 24 (1936)) directed to the United States Court of Appeals for the Third Circuit, to review an order and judgment of that court entered February 11, 1977 wherein that court refused to review the order of the United States District Court for the Eastern District of Pennsylvania dated August 7, 1975.

MERCEDES-BENZ OF NORTH AMERICA, INC.
AND DAIMLER BENZ A. G.
Petitioners

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—

PETITION FOR A WRIT OF STATUTORY CERTIORARI, AND, IN THE ALTERNATIVE, FOR A WRIT OF COMMON LAW CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Mercedes and Daimler respectfully petition the Court to grant a Writ of Statutory Certiorari pursuant to 28 U. S. C. § 1254(1) or, in the alternative, to grant a Writ of Common Law Certiorari pursuant to 28 U. S. C. § 1651 to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this case on February 11, 1977, which judgment and opinion refused to review the order of the United States District Court for the Eastern District of Pennsylvania dated August 7, 1975.

OPINIONS BELOW.

The opinion of the Court of Appeals, not yet reported, is printed in the Appendix beginning at A27. The opinion of a panel of the Court of Appeals, 1976 Trade Cases ¶ 61,002, previously rendered in this case but thereafter vacated by the Court of Appeals en banc, *Link & Katz v. Mercedes-Benz, N. A. & Daimler Benz A. G.*, Civil No. 75-2195 (3rd Cir., filed Feb. 11, 1977) is printed in the Appendix beginning at A18. The order and opinion of the District Court, 1975-2 Trade Cases, ¶ 60,534, is printed in the Appendix beginning at A5.

JURISDICTION.

The judgment of the Court of Appeals was entered on February 11, 1977. This Court's jurisdiction is invoked under 28 U. S. C. § 1254(1), which provides in part that "cases in courts of appeals may be reviewed by the Supreme Court by . . . writ of certiorari." In the alternative, if this case is not "in" the Court of Appeals because of the refusal of that court to review the order of the District Court, jurisdiction is invoked pursuant to the All Writs section of the Judicial Code, 28 U. S. C. § 1651, and a writ of common law certiorari is requested. *See In re 620 Church Street Bldg. Corp., supra.*

QUESTIONS PRESENTED.

1. Did the court of appeals misinterpret 28 U. S. C. § 1292(b) in refusing to review the order of the district court or to answer the first controlling question of law certified by the district court on the ground that it involved the discretion of the district court and was not attended by "special factors" and "other overriding legal issues"?

2. Do all large antitrust class action certifications under F. R. C. P. 23(b)(3) present "controlling questions of law", and is interlocutory review of such certifications in large class actions required to prevent the insulation of such orders from effective appellate review?

3. May a district court grant "contingent" class certification while specifically deferring the determination of whether issues raised with regard to "damages" meet the requirements of F. R. C. P. 23(b)(3)?

4. May a district court grant class certification under F. R. C. P. 23(b)(3) when it has misdefined and ignored the issues present in a § 4 Clayton Act class action?

5. In a claim under § 4 of the Clayton Act, do separate trials of "liability" and "damages," before different juries violate the Seventh Amendment to the Constitution?

CONSTITUTIONAL PROVISION, STATUTES AND RULES.

United States Constitution, Seventh Amendment
Interlocutory Appeals Act of 1958, 28 U. S. C. § 1292(b)
Sherman Act, Section 1, 15 U. S. C. § 1
Clayton Act, Section 4, 15 U. S. C. § 15
Rule 23, Federal Rules of Civil Procedure
Rule 42(b), Federal Rules of Civil Procedure

The text of these are set forth in full in the Appendix beginning at A65.

STATEMENT OF THE CASE.

This action was brought by two individuals on behalf of a purported nationwide consumer class of 300,000 Mercedes owners and lessees seeking damages under Section 4 of the Clayton Act and alleging that the defendants, Mercedes and Daimler, conspired with 588 Mercedes dealers,[1] over a four year period, to artificially raise and fix the prices of parts and labor time spent for all "nonwarranty" repairs to plaintiffs' automobiles in violation of Section 1 of the Sherman Act (R. 5a *et seq.*). Plaintiffs and defendants demand a jury trial.

Plaintiffs moved before the district court for certification of the action as a class-action and for definition of the class as ". . . all persons, firms or corporations who have had nonwarranty auto repairs performed on Mercedes-Benz automobiles, owned or leased by them . . ., during the period March 27, 1970 to March 27, 1974" (A6). Plaintiffs were granted full discovery to develop facts in support of their motion. When the question of certification was presented to the district court it was undisputed that each of the approximately 300,000 potential claimants would have to make a separate factual presentation on the issue of whether and to what extent he was injured. Other facts relevant to class certification, as developed during discovery or presented in unchallenged affidavits of defendants, are as follows: (1) during the relevant period the number of parts allegedly price fixed exceeded 26,000 and the number of labor operations allegedly priced fixed number in the thousands; (2) the total number of documents which would be involved in an attempt by all of the members of the class to establish whether and to what extent they were damaged would be between 4,800,000 and 12,000,000 customer repair invoices; (3)

1. The dealers are named as "co-conspirators" but not as defendants. See Appendix in the Third Circuit at 7a, certified to this Court as the Record, and hereinafter cited as "R".

tens of millions of different parts and labor operations listed on the invoices; (4) thousands of different labor rates for mechanics' time set by each of the 588 dealers.

In the face of the foregoing record, the district court, in August 1975, granted plaintiffs' motion for certification[2] (A1). In its Order the district court certified the issue of class certification for immediate appellate review,[3] stating that:

> "The undersigned is of the opinion that an immediate appeal from this Order is authorized by 28 U. S. C. § 1292(b), in that:
>
> 1. It involves controlling questions of law as to which there is substantial ground for difference of opinion, namely,
>
> **A. Whether it is proper to certify a class of approximately 300,000 members where the proof of damages will vary for each member of the class;**
>
> **B. Whether there can be a bifurcated trial in this case of liability and damages with separate juries for each segment of the case; and**
>
> 2. An immediate appeal from this Order may materially advance the ultimate termination of this litigation." (A2).

2. The district court also granted a stay of all proceedings in the case, except Rule 12 Motions (A2-3), pending application to the U. S. Court of Appeals for the Third Circuit for permission to appeal. Successive stays have been thereafter granted by the district court and the court of appeals, so that proceedings in the case remain stayed pending the present petition (A64).

3. On August 15, 1975, defendants also filed an appeal from the Order of August 7, pursuant to 28 U. S. C. § 1291. In view of the Third Circuit's order of September 12, 1975, permitting the § 1292(b) appeal, the § 1291 appeal was not docketed in the Third Circuit and was dismissed by stipulation in the district court pursuant to F. R. A. P. 42(a) on February 17, 1976.

In its memorandum opinion, the district court acknowledged the problems presented by certification of such an "enormous" class (A9) where the proof of damages will vary for each member of the class (A15), but concluded that those problems could be dealt with by bifurcated trials (A11). Acknowledging that different courts had reached different conclusions on the question of certification where the class was so large, the district court invited immediate review because certification was of "tremendous import" to all parties since such certification would of itself impose heavy burdens on them (A15).

A majority of the en banc court [3a] voted to vacate the earlier order granting permission to appeal, and to remand the case to the district court (A63).

Despite the certified questions, in which the district court requested appellate review of the propriety under Rule 23(b)(3) of its class action certification and its assumed procedures for the conduct of the trial as a class action,[4] the majority defined the sole issue in the appeal as:

> "Whether an antitrust action with potentially 300,000 claimants is manageable as a class action . . ." *Link & Katz v. Mercedes Benz of N. A. Inc., and Daimler-Benz, A. G.*, Civil No. 75-2195 (3rd Cir., filed Feb. 11, 1977) (hereinafter cited to appropriate Appendix reference as "Op. A28")

and answered its own question:

3a. Permission to Appeal was granted (A4), but a second panel declined to review the case and remanded it to the district court (A26); thereafter, re-hearing en banc was granted.

4. Under Rule 23(b)(3), certification is only "proper" if two questions are resolved by the district court. The questions are: predominance of the common issues over individual issues and whether a class action is superior to other means of adjudication. "Manageability" is only one of four "matters pertinent" to the above questions.

> "We decline to answer on the ground that the matter is one of fact subject to determination by the district court." *Id.*

The majority further stated:

> "In affording immediate appellate review of 'controlling questions of law,' § 1292(b) was not designed to substitute wholesale appellate certainty for trial court uncertainty . . ." (Op. A31)

The majority, treating the second certified question as unrelated to the first, termed it: ". . . essentially a request for an advisory opinion, which we may not honor" (Op. A28), and noted that the case was at a "preliminary stage" (Op. A33). The majority supported the refusal to hear the matter by stating that if after certification the case proved unmanageable, it could be decertified (Op. A33), so that the question of certification might never have to be dealt with.

In a concurring opinion, Chief Judge Seitz argued that there was presented a "controlling question of law," but that there had been no showing that the issues presented "substantial ground for difference of opinion." (Op. A35-36). Judge Seitz stated, however, that he might have found that there was "substantial ground for difference of opinion" if the district court's decision had rested on the assumption that it could later decertify the class (Op. A36).

In a dissenting opinion joined in by Judge Rosenn, Judge Adams argued that "a serious and controlling legal question has emerged with respect to the issue of separate juries to try the liability and damage phases . . ." which should be reviewed (Op. A39).

Judge Van Dusen also dissented on the basis that the district court failed "to make findings or show consideration" of seven key factors "among others" (Op. A41), without which it could not have complied with the Rule

23(b)(3) requirement that it exercise "informed judgment" as to the "superiority" of class treatment (A41 n. 1). As to the question of bifurcated jury trial, Judge Van Dusen concluded that while in his opinion the Seventh Amendment was no bar to a bifurcation of this trial, he did not believe "that class action treatment is permissible on this record, where a '§ 4 damage action charging price fixing' is involved." (Op. A44).

Judge Gibbons in dissent agreed with Judge Van Dusen that the district court misapprehended, *inter alia,* "the nature of § 4 liability in a Rule 23(b)(3) context . . ." (Op. A48) and further observed:

> "Assuming that such a price fixing conspiracy did exist, its impact upon the various class members would in all likelihood not present common questions of fact . . . Given 588 individual dealers, and thousands of different parts and labor rates, it is almost impossible to view the question of liability as being a common question since such liability determinations necessarily involve the question of impact of the conspiracy upon each individual class member." (Op. A49 n. 18).

Since in Judge Gibbons' view the district court incorrectly concluded that a § 4 case could be bifurcated into "liability" and "damages" for separate trials, and since "[t]he decision to have separate juries for each segment of the bifurcated trial was an essential postulate of the court's reasoning in support of its order granting class certification," Judge Gibbons concluded that the appeal should have been granted and the jury issue decided (Op. A51-2).

Reaching the merits, Judge Gibbons found "no statutory or due process barrier" (Op. A58) to trying first before one jury the "common" issue of whether the antitrust laws (§ 1 Sherman Act) were violated by defendants, and then having separate juries try for each complainant the issue of whether and to what extent that complainant was injured (Op. A56).

SUMMARY OF REASONS FOR GRANTING THE WRIT.

The proper standards for granting interlocutory appeal under Title 28 U. S. C. § 1292(b) in a purported class action under § 4 of the Clayton Act, and the interconnected question of whether there can be a bifurcated jury trial in such cases have never been reviewed by this Court. The restrictive interpretation of interlocutory appealability enunciated by the majority puts the Third Circuit in conflict with the prior decisions of the Ninth, Seventh and Second Circuits and with its own prior decisions. The majority's improper approval of the device of "contingent" certification upon which the district court's decision was premised places the Third Circuit in conflict with other circuits and opens the door to improvident certifications based on the erroneous belief that the matter can always later be decertified without harm. However, the very fact of certification with notice to consumers of defendants' products imposes heavy and irreparable burdens on the parties, as well as consuming needless district court time. The majority refused to deal with the question of bifurcated jury trial; such procedure impinges upon the constitutional right to jury trial, opens the door to devices not authorized by any statutory or other authority and as a practical matter, simply cannot work. Accordingly this case calls for review by this Court.

REASONS FOR GRANTING THE WRIT.

I. The Proper Construction of § 1292(b), the Interlocutory Appeals Act, Is an Important Federal Question Which Should Be Promptly and Definitively Resolved by This Court.

The court of appeals has improperly narrowed the class of cases reviewable under the Interlocutory Appeals Act of 1958, 28 U. S. C. § 1292(b) [5] (see discussion pp. 12-14, *infra*), the effect of which narrowing is to insulate Rule 23 class action certifications from any effective appellate review. (See pp. 15-16, *infra*).

The Supreme Court has never had occasion to interpret the scope of § 1292(b) [6] and should now provide definitive guidance.

This Court has made plain its determination that the section should be used to alleviate the rigidity and harshness of the final judgment rule.[7]

5. Section 1292(b) provides that the district judge may certify for review an order which involves (1) "controlling question of law," (2) to which there is "substantial ground for difference of opinion," and (3) the appeal of which "may materially advance the ultimate termination of the litigation." Acceptance of the appeal is within the "discretion" of the court of appeals. 28 U. S. C. § 1292(b). The only issue in this case is the meaning of "controlling question of law" since certification of requirements (2) and (3) was not questioned by the court of appeals, except Judge Seitz, concurring.

6. *Tidewater Oil Co. v. United States*, 409 U. S. 151 (1972), dealt with the Act's relationship to the Expediting Act, 15 U. S. C. § 29.

7. It is significant that this Court granted certiorari in at least twenty-one cases which had been certified below under § 1292(b) and thereby was enabled, before final judgment, to clarify the law and shorten litigation on such issues as: transfer orders, *Continental Grain Co. v. Barge FBL – 585*, 364 U. S. 19 (1960); the tolling of the statute of limitations in both non class and class action antitrust cases, *Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co.*, 381 U. S. 311 (1965) and *American Pipe and*

> "We believe that Congress, in enacting present §§ 1291 and 1292 of Title 28, has been well aware of the dangers of an overly rigid insistence upon a 'final decision' for appeal in every case, and has in those sections made ample provision for appeal of orders which are not 'final' so as to alleviate any possible hardship." *Liberty Mutual Insurance Co. v. Wetzel*, 424 U. S. 737, 746 (1976).

Mr. Justice Frankfurter, referring to § 1292(b) and other interlocutory appeal statutes, stated:

> "Since the procedural aspects of law deal with the practical affairs of men and do not constitute an abstract system of doctrinaire notions, Congress has recognized the need of exceptions for interlocutory orders in certain types of proceedings where the damage of error unreviewed before the judgment is definitive and complete, has been deemed greater than the disruption caused by intermediate appeal." *DiBella v. United States*, 369 U. S. 121, 124-25 (1962) (citations omitted).

7. (Cont'd.)

Construction Co. v. Utah, 414 U. S. 538 (1974); the right to a jury trial in a shareholders' derivative suit, *Ross v. Bernhard*, 396 U. S. 531 (1970); whether a state can sue on behalf of its citizens under the antitrust laws, *Hawaii v. Standard Oil Co.*, 405 U. S. 251 (1972); and the jurisdictional reach of antitrust laws, *Gulf Oil Corp. v. Copp Paving Co.*, 419 U. S. 186 (1974). *See also, TSC Industries, Inc. v. Northway, Inc.*, 426 U. S. 438 (1976); *Abbott Labs v. Portland Retail Druggists*, 425 U. S. 1 (1976); *Matthews v. Weber*, 423 U. S. 261 (1976); *Milliken v. Bradley*, 418 U. S. 717 (1974); *Reliance Electric Co. v. Emerson Electric Co.*, 404 U. S. 418 (1972); *Usner v. Luckenbach Overseas Corp.*, 400 U. S. 494 (1971); *Moragne v. States Marine Lines, Inc.*, 398 U. S. 375 (1970); *Mills v. Electric Auto-Lite Co.*, 396 U. S. 375 (1970); *Fortnightly Corp. v. United Artists Television Inc.*, 392 U. S. 390 (1968); *Tcherepnin v. Knight*, 389 U. S. 322 (1967); *Toilet Goods Ass'n., Inc. v. Gardner*, 387 U. S. 158 (1967); *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U. S. 714 (1967); *Levin v. Mississippi River Fuel Corp.*, 386 U. S. 162 (1967); *Pure Oil Co. v. Suarez*, 384 U. S. 202 (1966); *Schnell v. Eckrich & Sons*, 365 U. S. 260 (1961).

A. The Narrow Interpretation of "Controlling Question of Law" in § 1292(b) by the Court of Appeals Is Impropef and Is in Conflict With Other Circuits.

The court of appeals has taken an impermissibly narrow approach to the interpretation and application of § 1292(b) by defining "controlling question of law" as being limited to those issues in which no factual determination or exercise of discretion was involved, and requiring that there be additional "special factors" and "other overriding legal issues." (Op. A30).

The refusal to review any issues containing factual determinations or an exercise of discretion is contrary to the interpretation of § 1292(b) followed by the courts of appeals for the ninth, seventh and second circuits. *Blackie v. Barrack*, 524 F. 2d 891, 900-01 (9th Cir. 1975); *Lear Siegler, Inc. v. Adkins*, 330 F. 2d 595, 598 (9th Cir. 1964) "[t]he controlling question of law here involved is whether the district court was in error or abused its discretion in granting the stay"); *Bersch v. Drexel Firestone, Inc.*, 519 F. 2d 974, 994 and n. 44a (2d Cir. 1975), *cert. denied*, 423 U. S. 1018 (1975); *Sanders v. John Nuveen & Co., Inc.*, 463 F. 2d 1075, 1081-83 (7th Cir. 1972), *cert. denied*, 409 U. S. 1009 (1973). In fact no better example of the correct interpretation of § 1292(b) can be found than *Katz v. Carte Blanche*, 496 F. 2d 747 (3rd Cir.), *cert. denied*, 419 U. S. 885 (1974), wherein the Third Circuit said:

> "The key consideration is *not* whether the order involves the exercise of discretion, but whether it truly implicates the policies favoring interlocutory appeal. The determination of what orders are properly reviewable under § 1292(b) must be made by a practical application of those policies, not by a mechanical application of labels such as 'discretionary' or 'non-discretionary.'" *Katz v. Carte Blanche, supra* at 756 (emphasis added).

By labeling Rule 23 requirements as "discretionary" the court of appeals has refused to offer any guidelines or supervision to the district courts for determination of Rule 23 class action motions. It has indicated that it will abide by any district court determination if that court, as it did in this case, merely pays lip service to the requirements of Rule 23 by making conclusory statements that the requirements of the Rule have been met.

Furthermore, the court of appeals has improperly engrafted onto "controlling question of law" the additional requirement that such a question must also be attended by special factors, overriding legal issues (Op. A30) or what some courts have termed "exceptional circumstances." This interpretation has been specifically rejected by the Fifth Circuit in *Hadjipateras v. Pacifica, S. A.*, 290 F. 2d 697, 703 (5th Cir. 1961), as a "Shibboleth," frustrating the policy in § 1292(b).

This restrictive interpretation of interlocutory appealability is in direct conflict with the expressions of this Court as to the role of § 1292(b) in the appellate process and ignores the meaning of the Act as illuminated by its legislative history.[8] That history demonstrates that the

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8. The Interlocutory Appeals Act of 1958 resulted from the "growing awareness of the need for expedition of cases pending before the District Courts." S. REP. No. 2434, 85th Cong., 2nd Sess. (1958), reprinted in U. S. Cong. and Admin. News, 85th Cong., 2nd Sess. at 5256.

The provision is an attempt to remedy not only the injustice and burden to a party from an erroneous decision of a determinative issue early in the proceedings but also the subsequent waste of judicial resources by the trial court after an erroneous decision. *Letter of Transmission of the Judicial Conference of the United*

Act's primary purpose was to provide immediate appellate review of large and complicated lawsuits, the "exceptional cases where a decision of the appeal may avoid protracted and expensive litigation, *as in antitrust and similar protracted cases* . . ." Hearings before subcommittee No. 3 of The House Comm. on the Judiciary on H. R. 6238, 85th Cong. 2d Sess. ser. 11 (1958) (emphasis added). As noted by Judge Brown,

> "Moreover, it was a judge-sought, judge-made, judge-sponsored enactment. Federal judges from . . . experience gained in the adjudication of today's complex litigation, were acutely aware . . . [that] there are occasions . . . in which as a practical matter orderly administration is frustrated by the necessity of a waste of precious judicial time while the case grinds through to final judgment as the sole medium through which *to test the correctness of some isolated identifiable point of fact, of law, of substance or procedure,* upon which in a relative way the whole case or defense will turn." *Hadjipateras v. Pacifica, S.A., supra,* at 702-703 (emphasis added).

B. Large Class Action Certifications Present Controlling Questions of Law, Because of Their Decisive Impact on the Future Course of the Litigation and Unless Such Certifications Are Reviewed Immediately, They Are Effectively Insulated From Any Appellate Review.

Any large class action determination presents a "controlling question of law" because of the decisive impact

8. (Cont'd.)
States, Draft of Section 1292(b), reprinted in U. S. Cong. and Admin. News, *supra,* at 5258.
This act followed the judicially created exception to the final judgment rule, the collateral order doctrine embodied in *Cohen v. Beneficial Industrial Loan Corporation,* 337 U. S. 541 (1949).

which it necessarily has on the subsequent course of the litigation and the requisite commitment of judicial resources.

It is unarguable that a case claiming damages on behalf of one or two individual plaintiffs will be conducted in a markedly different manner from a case in which damages on behalf of a nationwide class are sought. For example, the permitted scope of discovery and pre-trial proceedings in general may be considerably broader, more costly and time consuming if a nationwide class is certified. Furthermore, defendants in a nationwide class action suffer irreparable harm to their business goodwill and reputation by the sending of class action notice to the consumers of its product. No later appellate review, no matter how thorough, can ever undo the effect of the notice.

Now is the *only* time for meaningful appellate review of the class certification question. As has been noted:

> "Candor compels us to add that as appellate judges we would be reluctant to hold that a class action had been improper after the district court and the parties had expended much time and resources although we might have had serious doubts if we had reviewed the question at the inception of this action." *Herbst v. International Telephone & Telegraph Corp.,* 495 F. 2d 1308, 1313 (2d Cir. 1974).

Further, review of certification now is clearly appropriate since there is growing recognition that class action certifications have an *in terrorem* effect on settlement. *See* Op. A43, (Van Dusen, J., dissenting); *Parkinson v. April Ind. Inc.,* 520 F. 2d 650, 654 (2d Cir. 1975); *Herbst v. Int'l. Tel. & Telegraph Corp., supra* at 1313; *cf., Kline v. Coldwell, Banker & Co.,* 508 F. 2d 226, 236-38 (9th Cir. 1974) (Dunway, J., concurring), *cert. denied,* 421 U. S. 963 (1975); *See also, In re Hotel Telephone Charges,* 500 F. 2d 86 (9th

Cir. 1974); *Landers, Of Legalized Blackmail and Legalized Theft; Consumer Class Actions and the Substance Procedure Dilemma*, 47 So. Calif. L. Rev. 842 (1974).

As this Court noted in a 10(b)(5) securities class action:

> "even a complaint which by objective standards may have very little chance of success at trial has a settlement value to the plaintiff out of any proportion to its prospect of success at trial so long as he may prevent the suit from being resolved against him by dismissal or summary judgment. The very pendency of the lawsuit may frustrate or delay normal business activity of the defendant which is totally unrelated to the lawsuit." *Blue Chip Stamps v. Manor Drug Stores*, 421 U. S. 723, 740 (1975) (citations omitted).

Of course not every class action certification is reviewable under § 1292(b), since the district court also must certify that "there is substantial ground for difference of opinion [on the controlling question of law] and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." A district court will be naturally hesitant to certify that it may have erred. Furthermore if the circuit courts accept their responsibility under § 1292(b) to provide concrete guidelines for Rule 23 determinations, the number of such determinations in which district courts would certify that a "substantial ground for difference of opinion" exists would greatly decrease. Finally, the appellate court has the discretion to accept or reject the appeal.

Thus, acceptance by this Court of the proposition that class certifications present "controlling questions of law" would not result in a substantial increase in § 1292(b) appeals.

The appellate court's statement that ". . . § 1292(b) was not designed to substitute wholesale appellate certainty for trial court uncertainty . . ." (Op. A31) is a betrayal of the judicial maxim best enunciated by Lord Coke that "the knowne certaintie of the law is the safetie of all." The court has abdicated a traditional appellate function of providing concrete guidelines to lower courts within which to make factual determinations [9] and has retreated behind the excuse that:

> "Our constantly increasing caseload reinforces the other more philosophical reasons for that policy." (Op. A30).

Judge Gibbons in dissent termed that excuse "insupportable" (Op. A52), noting that "§ 1292(b) appeals from class action determinations . . . are an insignificant part of the appellate caseload." [10] (Op. A52).

The court of appeals has, thus, tacitly approved the legal morass and total uncertainty which has proliferated as a result of the irreconcilable decisions in the circuit and district courts in large class actions to the detriment of both plaintiffs and defendants.

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9. The discretionary aspects of § 1292(b) should not be used as a rationale for avoiding the difficult questions presented in class certification. As has been noted:

> "[The] spirit and purpose [of Rule 23] should not be frustrated by an unarticulated and perhaps subconscious hope on the part of appellate judges that if review of important class action determinations are delayed until the merits of the suit have been decided, the question of such class determination may be mooted and difficult questions avoided." *Anschul v. Sitmar Cruises, Inc.*, 544 F. 2d 1364, 1373 (7th Cir. 1976) (Swygert & Bauer, J.J., dissenting).

10. According to Professor Wright, all the cases certified under § 1292(b) amount to about 100 per year of which appeal is allowed by the Circuits in about half. Thus § 1292(b) appeals are not numerically important to the case load of courts of appeals which in 1974 amounted to 16,436 cases. Wright, *Federal Courts*, 518-19 (3rd ed. 1976).

II. This Court Should Exercise Judicial Oversight to Correct the Failure of the District Court Both to Construe Properly the Requirements of F. R. C. P. 23(b)(3) and to Require the Proponents of the Class to Meet Their Burden of Demonstrating Compliance With the Rule.

The federal court system is presently in irreconcilable conflict on the findings and analysis required of district courts before certifying under Rule 23, particularly in § 4 Clayton Act cases. Therefore, it is imperative that in this § 4 Clayton Act action this Court resolve such conflict and furnish definitive guidance to the lower courts.

The essential split in the analysis [11] and application of Rule 23 in Clayton Act cases is demonstrated by the contrasting views expressed by the Ninth and Fifth Circuits compared with that enunciated by the Fourth Circuit.

The Fifth Circuit has made the following analysis of the interplay between the antitrust laws and Rule 23 requirements as a prerequisite to class certification:

> "The district court denied Shumate class action status because of its conclusion that, even if a conspiracy were proved, the controlling question as to liability was whether a class member had suffered injury . . . [T]he proof of injury to business or property of each class member is critical for the determination of defendants' liability to any individual." *Shumate & Co., Inc. v. National Association of Securities Dealers, Inc.*, 509 F. 2d 147, 155 (1975), *cert. denied*, 423 U. S. 868 (1976) (citations omitted).

Consistent with that view is the Ninth Circuit's opinion:

> "The appellee's attorneys have asserted that burdening the already strained judicial resources with this class action, which promises no real benefit to class members, is nonetheless justified on the ground that allowing the suit will serve to 'punish' and 'deter' antitrust violations. But the Congressional scheme does not contemplate that private attorneys are to act as prosecutors to force antitrust violators to disgorge their illegal profits in the general interest of society at large. The antitrust laws focus on the compensation of parties actually injured, presupposing that a plaintiff can prove that he was in fact injured as a proximate result of an antitrust violation." *In Re Hotel Telephone Charges, supra* at 91-92 (citations omitted).

In contrast, a divided panel of the Fourth Circuit recently took the position that the plaintiffs have the benefit of a rebuttable presumption of class certification propriety:

> "What we do say is that there is almost a rebuttable presumption that such a class action should be allowed where there is a plausible claim of violation of the Sherman Act." *Windham v. American Brands, Inc.*, 539 F. 2d 1016, 1021 (4th Cir. 1976) (case *sub judice*, following reargument before the court en banc, February 14, 1977).

Similarly, the decision in the district court in this case, although not adopting the "rebuttable presumption" theory, had the same effect, by utilizing a "wait and see" attitude.

11. As might be expected in an area of the law which suffers from lack of appellate supervision, the decisions in the district courts are also irreconcilable and so varied they often cannot be categorized except on the basis of the judge's predilection towards the social desirability of class actions.

Compare e.g. In re Transit Co. Tire Litigation, 67 F. R. D. 59 (W. D. Mo. 1975); *Ralston v. Volkswagenwerk A. G.*, 61 F. R. D. 427 (W. D. Mo. 1973); *Al Barnett v. Outboard Marine Corp.*, 64 F. R. D. 43 (D. Del. 1974); *with Arenson v. Board of Trade of Chicago*, 372 F. Supp. 1349 (N. D. Ill. 1974); *City of Philadelphia v. Am. Oil Co.*, 53 F. R. D. 45 (D. N. J. 1971); *Illinois v. Harper & Row Publishers, Inc.*, 301 F. Supp. 484 (N. D. Ill. 1969).

The recent enactment of the *Hart-Scott-Rodino Antitrust Improvements Act of 1976*, 15 U. S. C. §§ 15c to 15h, 18a, 66, providing for vindication of the rights of "society at large" not by class actions but by parens patriae actions, eliminates any justification for expanding the application of Rule 23, and the antitrust laws to accommodate plaintiffs for whom class actions would have been the only practical way that individual consumers could recover.

A. The District Court's "Contingent" Class Certification Is Impermissible Under F. R. C. P. 23(b)(3).

The district court erred by holding that plaintiffs, after class certification should "be given an opportunity to develop a method of proving damages . . ." (A10).[12] The court concluded by claiming that: "In any event the court has the right to decertify the class following a determination of liability . . ." (A11).

This procedure violates the provision of Rule 23(c)(1) that:

> "As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits." F. R. C. P. 23(c)(1).

The majority declined to review the district court's order, observing that: "The district court therefore viewed the scope of its order as limited and contingent." (Op. A32). Rule 23(c)(1), however, only permits "conditional" certification, i.e., certification after showing compliance with *all* requirements of the Rule, conditioned upon plaintiffs' continued demonstration of compliance therewith. But the rule does not permit "contingent" certification, i.e., certification prior to a showing of compliance with all requirements of the rule subject to later showing of compliance.[13]

Thus, the court of appeals distorted Rule 23(b)(3) and authorized the district court to certify the action as a class action in the face of *known* and *unresolved* problems, anticipating that ultimate decertification—after the parties and court have borne the burdens of class action development—may likely be the only resolution of those problems. This ruling completely distorts the law governing class action certification and should now be reviewed by this court. Furthermore the district court's contingent certification procedure permits the plaintiffs another opportunity to concoct at their leisure a method of proving damages, after plaintiffs have sent notice to the consumers of defendants' product and is a procedure which is impermissible under Rule 23 and inherently unfair to the defendants in this and any other consumer class action.

B. The District Court Improperly Interpreted and Incorrectly Defined the Rule 23(b)(3) Issues in This § 4 Clayton Act Case.

The district court's formulation of seven "common questions" [14] (A7-8) demonstrates its misconception of the

12. The requirement that plaintiffs must show compliance with Rule 23 does not involve a mini trial on the merits, forbidden by this Court in *Eisen v. Carlisle & Jacquelin*, 417 U. S. 156 (1974), but simply *how* the trial will be conducted as a class action.

13. ". . . the judge may not conditionally certify an improper class action on the basis of a speculative possibility that it may later meet the requirements." *Blackie v. Barrack, supra* at 901.

14. The district court's expression of the "common questions" was as follows (A7-8):

> "[1.] whether defendants combined and conspired to establish retail parts prices to be charged to the class by the dealers;

issues and proof required, as the dissenting opinions of both Judges Gibbons and Van Dusen demonstrate.

The district court's questions [1], [2], and [5], i.e., whether defendants conspired between themselves, or with the National Dealer Council, to establish the retail price of parts and labor, ignore the language of the complaint which alleges a conspiracy between defendants and 588 dealers, and not one between defendants or between defendants and a National Dealer Council (R. 5a, 7a). The district court's question [4] concerning enforced compliance, is equally irrelevant since the plaintiffs have alleged a conspiracy, or agreement, not coercion (R. 11a). The district court thus appears to have considered the issue to be whether Mercedes and Daimler conspired with a dealer-council, and then enforced that conspiracy on all the dealers.

The district court's question [6], whether the plaintiff class was harmed by the alleged acts of the defendants

"... demonstrates the court's misapprehension of the nature of § 4 liability in a Rule 23(b)(3) con-

14. (Cont'd.)

[2.] whether defendants combined and conspired to establish designated labor times to be utilized by dealers in setting prices to the class for nonwarranty repairs of Mercedes-Benz vehicles;

[3.] whether documents establishing prices for parts and the amount of designated labor times were circulated among the dealers;

[4.] whether defendants enforced compliance by the dealers in regard to the prices for parts for designated labor time;

[5.] whether the defendants conspired with the Mercedes-Benz National Dealer Council in regard to establishment of fixed prices for parts and designated labor time for repair work in the performance of nonwarranty auto repairs;

[6.] whether the plaintiff class was harmed by the alleged acts of the defendants and;

[7.] whether the alleged acts of the defendants, if proved, violate the antitrust statutes of the United States."

> text, for obviously only individual members of the class, not the class, can be injured in business or property by a retail price fixing conspiracy . . . [C]ertainly there is nothing in the district court opinion, or in the affidavits which have been called to our attention, suggesting that the conspiracy had a like effect upon the business or property of every repair customer of all 588 individual Mercedes dealers." (Op. A48-49) (Gibbons, J., dissenting).

The district court's question [7], whether defendants' alleged acts if proved violate the antitrust laws, further reflects the court's "misapprehension of the nature of § 4 liability in a Rule 23(b)(3) context," since whether a "price fixing conspiracy, if proved, violates § 1 [Sherman Act] hardly seems an open legal question." (Op. A48-49) (Gibbons, J., dissenting).

In addition to the above misdefinitions, the district court failed to consider several other factors present in a § 4 Clayton Act action.

As Judge Van Dusen noted in dissent below, the district court ignored the following:

> "(a) that the liability aspect of the trial required a decision not only of violation of §§ 1 and 2 of the Sherman Act, 15 U. S. C. §§ 1 and 2, but also determination under 15 U. S. C. § 15 of the fact of damage (an element which would give rise to problems in proving the latter item on a class basis where the class consists of 'potentially 300,000 claimants' located in all 50 states, Puerto Rico, Guam, and the Virgin Islands);
>
> (b) that there would be a substantial difference in the quantum and character of liability proof under § 4 of the Clayton Act, 15 U. S. C. 15, if the plaintiffs

included all the above 300,000 individuals alleged to comprise the class, rather than only the named plaintiffs;

(c) that determination of liability itself under § 1 of the Sherman Act might also vary as to each class member, depending upon whether the particular dealer-defendant participated in the conspiracy, so that inquiry is required into whether the common questions predominate over the individual questions making a class action superior under F. R. Civ. P. 23(b)(3);

(d) that, on this record, there would appear to be no theoretical or practical formula or method to aid in the computation of damages sustained by different individuals, potentially requiring each class member to produce voluminous documentary evidence of his transactions in order to secure judgment;

(e) that, in view of the above, there is a question as to whether the named plaintiffs are typical as required by F. R. Civ. P. 23(a)(3);

(f) that, if more than one class is necessary, the named plaintiffs might not adequately represent many members of the group of 300,000 persons treated as members of various classes and subclasses by the district court, see F. R. Civ. P. 23(d)(4); and

(g) that class suits have an *in terrorem* effect in forcing settlement (*cf. Blue Chip Stamps v. Manor Drug Stores,* 421 U. S. 723, 740-42 (1975))." (Op. A41-43) (footnotes omitted).

The failure of the district court to perceive the elements of § 4 Clayton Act liability is most aptly summarized by Judge Gibbons:

"The district court's misconception of the substantive elements of § 4 liability are clearest in its treatment of the distinction between § 4 'liability' and 'damages.' Nowhere does the court show an awareness that some degree of injury to business or property—damages if you will—is a substantive element of § 4 liability. (Op. A50) (dissenting opinion).

III. In a § 4 Clayton Act Case the Issues of Liability and Damages Cannot Constitutionally Be Severed and Tried Before Separate Juries.

One of the most puzzling features of the opinion of the majority of the court of appeals, was its refusal to answer the question certified by the district court as to whether there may be separate juries utilized during the liability and damages phases of a bifurcated trial. There were two grounds advanced for this refusal. First, the majority found that since there was no "definitive order" on that subject by the district court, "the inquiry is essentially a request for an advisory opinion, which we may not honor." (Op. A28).

This conclusion is simply contrary to the plain language and rationale of the district court's decision. That court was required by Rule 23 to find that the class action was superior to other procedures as a method of solving the controversy. However, the court was faced with the acknowledged problem that proof of damages would vary for each of the 300,000 potential claimants. Its premise in granting certification was that this problem could be solved by a bifurcated jury trial, i.e., a common trial on liability followed by a separate damage determination for each claimant.

It was precisely because its conclusions on the issue of bifurcated jury trial constituted a key premise for its deci-

sion to grant class action status that the district court certified this issue for review by the court of appeals. Therefore, the majority was clearly wrong in finding that the question as certified constituted merely a request for an "advisory opinion."

The dissenting judges had no difficulty perceiving this fact. Judges Adams and Rosenn concluded that:

> ". . . a fair reading of the district judge's opinion indicates that the assumed propriety of that mechanism [bifurcated trial and separate juries] appears to have been one of the prime predicates of his decision to certify the case as a class action, at least in the first instance." (Op. A40).

And Judge Gibbons, in a part of his opinion expressly adopted by Judge Van Dusen, stated that:

> "Despite the majority opinion of this court, it is clear beyond dispute that the district court's decision in favor of Rule 23(b)(3) class action certification was based upon a decision to try the liability and damage issues before *separate* juries." (Op. A50)
>
> "The decision to have separate juries for each segment of the bifurcated trial was an essential postulate of the district court's reasoning in support of its reasoning in support of its order granting certification. It is clear beyond peradventure that the district judge would not have entered the class action order except for his belief in the legal proposition that he could try liability and damages in a Section 4 Clayton Act case before separate juries." (Op. A51).

The second reason advanced by the majority was that the parties might later waive their right to jury trial, thus making the question premature and speculative. Such reasoning ignores the decisions of this court in *Dairy Queen v. Wood*, 369 U. S. 469 (1962) and *Ross v. Bernhard*, 396 U. S. 531 (1970), both of which reviewed, at the pleading stage, district court rulings on demands for jury trial.

The Seventh Amendment to the Constitution does not permit trial before separate juries of the "liability" and "damages" questions in a Clayton Act case, and this court should provide definitive guidance to that effect.[15]

This court has never ruled upon the availability of separate juries in the initial trial of any case. In *Gasoline Products v. Champlin Refining Co.*, 283 U. S. 494 (1931), this Court permitted a retrial of less than the entire case but only if "it clearly appears that the issue to be retried is so distinct and separable from the others that a trial of it alone may be had without injustice." 283 U. S. at 500.

The district court's proposed division would thus be improper. As Judge Gibbons noted, it is not possible to divide a Clayton Act § 4 class action into liability and damage, since there can be no liability—no standing to sue—without damage. If there is to be any preservation of the constitutional right to jury trial, then the claims of damage of each of the claimants must be subjected to such jury

15. The Third, Sixth, and Seventh Circuits have noted that separate juries would raise substantial constitutional questions. *See Katz v. Carte Blanche, supra* at 761; *Moss v. Associated Transport, Inc.*, 344 F. 2d 23 (6th Cir. 1965); *Hosie v. Chicago and N. W. Ry. Co.*, 282 F. 2d 639 (7th Cir. 1960), *cert. denied*, 365 U. S. 814 (1961). The Ninth Circuit has also reserved decision. *United Airlines Inc. v. Wiener*, 286 F. 2d 302 (9th Cir.), *cert. denied*, 366 U. S. 924 (1961). Only the Fifth Circuit has approved such separate trials; that approval was in conclusory terms and did not involve issues as intertwined as those in a Clayton Act case. *Swofford v. B & W, Inc.*, 336 F. 2d 406 (5th Cir. 1964), *cert. denied*, 379 U. S. 962 (1965). The Tenth Circuit has noted its possible approval of separate juries. *See, Union Carbide and Carbon Corp. v. Nisley*, 300 F. 2d 561, 589 (10th Cir. 1962).

trial, which means hundreds of thousands of such trials. As Judge Gibbons pointed out,

> "Such a rule [*Gasoline Products, supra*] is dictated for the very practical reason that if separate juries are allowed to pass on issues involving overlapping legal and factual questions the verdicts rendered by each jury could be inconsistent." (Op. A55).

Because the issues of liability and damage are individualized, and the issues of liability and damages overlap, the requirements of *Gasoline Products, supra,* and F. R. C. P. 42(b) have not been met. The issues of liability and damages must be tried before the same jury, the proof of "fact of injury" or "damage" to establish liability, and the proof to establish the "amount of such injury" or "damages" would so overlap that the second trial would be but a retrial of the first with the risk of inconsistent verdicts.

Judge Gibbons' answer to this problem was to endorse the approach devised by Judge Wyzanski in *Windham v. American Brands, Inc., supra,* under which a trial would first be held to determine whether § 1 of the Sherman Act had been violated, i.e., was there a conspiracy among the defendants to fix prices. In the event of an affirmative finding, a second trial—or series of trials—would be held to determine liability and damage under § 4 of the Clayton Act.

The approach favored by Judges Wyzanski and Gibbons is, at first glance, ingenious. It has, however, its own flaws. To begin with, it creates a remedy and procedure which have no basis whatever in the laws passed by Congress. Second it provides no more of a "solution" than did the approach of the district court with respect to the adjudication of individual claims.

Judge Wyzanski found support for his approach in the procedure under which a judgment in a government antitrust suit is prima facie evidence in a subsequent private action. Yet, as Judge Gibbons candidly acknowledged, the analogy is incomplete in two respects. First, the "violation determination" in this case would be not merely prima facie evidence but the law of the case. Second, and even more important in our view:

> "Congress has not authorized a general roving commission for the enforcement of the antitrust laws. Instead, it has authorized private enforcement only by persons suffering actual or threatened injury to their business or property. Under Judge Wyzanski's approach, however, a party who never really suffered any injury to his business or property might nevertheless obtain a violation determination having a more significant effect than a decree in a government action. Perhaps concern about such a possibility explains the Fourth Circuit's recent vote to rehear *Windham v. American Brands, Inc., supra,* en banc." (Op. A58).

Despite the foregoing reservations, Judge Gibbons concluded that the Wyzanski approach is "consistent with current Congressional intention with respect to antitrust enforcement" (Op. A61). It is curious indeed that Judge Gibbons found reinforcement for his conclusion in the passage of the *Hart-Scott-Rodino Antitrust Improvements Act of 1976, supra,* since it provides for aggregate damages *without separate proof of individual claims.*

Further, Judge Gibbons finds in the passage of the Act, evidence that "Congress would prefer an imaginative approach to class action litigation in § 4 cases." (Op. A62). Yet, here again Judge Gibbons is candid in acknowledging the counter arguments—"that the new § 301 cause of action occupies the field and that its explicit nonretroactivity

shows an intention not to extend the utilization of Rule 23 in the antitrust field" (Op. A62).

In the end, Judge Gibbons is forced to conclude that:

> "The message that one reads into the enactment probably will be essentially a product of his own conviction as to the social desirability of consumer class actions" (Op. A62).

The convictions of one or more judges as to the "social desirability" of class actions is, we submit, not a sufficient basis on which to create a novel remedy by judicial legislation. As the Ninth Circuit observed on this point:

> "Judges should not significantly tamper with legislative enactments simply to satisfy their own individual notions as to sound public policy." *In re Hotel Telephone Charges, supra* at 92.

The Wyzanski-Gibbons approach, like that of the district court does not solve the problems of individual proof. Neither the opinion of Judge Wyzanski in *Windham* nor the dissent of Judge Gibbons in the present case successfully addresses the question of how the § 4 Clayton Act trials are to be carried out after a § 1 Sherman Act violation has been established. Thereafter, a defendant would still retain the right to a jury trial on any claim as to which the fact or amount of injury was disputed. This would mean in practical terms, successive juries to determine hundreds of thousands of claims, and is simply beyond the capacity of the district court. Even assuming a certain grouping of claimants, perhaps by dealer, the litigation could easily occupy the remaining judicial career of the present district judge and that of his ultimate successor.

CONCLUSION.

For the foregoing reasons, the Court should grant a Petition for Certiorari in this case.

Respectfully submitted,

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DATED: April 4, 1977

APPENDIX.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

CIVIL ACTION No. 74-771.

JULES LINK and SOLOMON KATZ, on Behalf of Themselves and All Others Similarly Situated

v.

MERCEDES-BENZ OF NORTH AMERICA, INC.
DAIMLER-BENZ A.G.

ORDER.

AND Now, this 7th day of August, 1975, upon consideration of the record herein, including all papers filed relating hereto, it is hereby ORDERED that:

1. The Order of July 8, 1975 is hereby vacated.

2. This action shall be maintained as a class action pursuant to Fed. R. Civ. P. 23(b)(3).

3. The class herein is defined as all persons, firms or corporations who have had nonwarranty auto repairs performed on Mercedes-Benz automobiles, owned or leased by them, by Mercedes-dealers, during the period March 27, 1970 to March 27, 1974.

4. Plaintiffs, Jules Link and Solomon Katz, are hereby designated as class representatives.

5. The firm of Harold E. Kohn, P. A., Attorneys at Law, is hereby designated as counsel to the class for the prosecution of this action.

6. Counsel for the class shall meet with counsel for the defendants forthwith in order to attempt to obtain agreement on the method of notifying the class and the form of notice to be sent.

7. The undersigned is of the opinion that an immediate appeal from this Order is authorized by 28 U. S. C. § 1292(b), in that:

1. It involves controlling questions of law as to which there is substantial ground for difference of opinion, namely,

A. Whether it is proper to certify a class of approximately 300,000 members where the proof of damages will vary for each member of the class;

B. Whether there can be a bifurcated trial in this case of liability and damages with separate juries for each segment of the case; and

2. An immediate appeal from this Order may materially advance the ultimate termination of this litigation.

8. It is ORDERED that all proceedings in this case (except those set forth in Paragraph 9, *infra*) be stayed for ten (10) days from date of entry of this Order. If, within such ten (10) days, the defendants shall apply to the United States Court of Appeals for the Third Circuit for permission to appeal from this Order, the proceedings

herein (except those stated in Paragraph 9, *infra*) shall be stayed pending determination of such application or of the appeal, if it is allowed.

9. The Defendants' Motions under Rule 12 (Documents 4, 5, 7 and 8 herein) are subject to the following schedule:

A. By September 10, 1975 defendants shall have completed their translation of the documents previously selected and translated by plaintiffs, and the parties shall have met and endeavored to agree upon a translation or summary for such documents;

B. Plaintiffs' reply brief and affidavits, if any, shall be served on September 19, 1975;

C. Defendants' rebuttal brief and affidavits, if any, shall be served on September 30, 1975;

D. A Pre-Trial Conference and argument on the said Motions are scheduled for October 7, 1975, at 11 a.m.

10. A Memorandum Opinion with the Court's findings will be filed hereafter.

EDWARD N. CAHN
Edward N. Cahn, *J.*

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

—

C. A. Misc. Record No. 75-8167

—

JULES LINK and SOLOMON KATZ, on behalf of themselves and all others similarly situated

v.

MERCEDES-BENZ OF NORTH AMERICA, INC.
DAIMLER-BENZ A. G.

—

(D. C. Civil No. 74-771)

—

Present: KALODNER, VAN DUSEN and HUNTER,
Circuit Judges

—

ORDER.

It is ORDERED that the PETITION FOR PERMISSION TO APPEAL is granted.

By THE COURT:—

VAN DUSEN
Circuit Judge

Dated: September 12, 1975

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

—

Civil Action No. 74-771

—

JULES LINK and SOLOMON KATZ, on behalf of themselves and all others similarly situated

v.

MERCEDES-BENZ OF NORTH AMERICA, INC.,
DAIMLER-BENZ A. G.

—

MEMORANDUM OPINION.

CAHN, J. September 25, 1975

The plaintiffs, Jules Link and Solomon Katz, are owners of Mercedes-Benz automobiles. They have filed a complaint containing class action allegations against Daimler-Benz A. G., the manufacturer of Mercedes-Benz automobiles and parts, and its agent and wholly-owned subsidiary, Mercedes-Benz of North America, Inc., the exclusive United States distributor of Mercedes-Benz automobiles and parts. The basis of the complaint, which seeks treble damages and injunctive relief, is alleged price fixing in regard to nonwarranty repair work on Mercedes-Benz automobiles in violation of Section 1 of the Sherman Act (15 U. S. C. § 1) and Sections 4 and 16 of the Clayton Act (15 U. S. C. § 15 & § 26). On July 8, 1975, an Order was entered certifying this case to class action status. The class was defined:

". . . as all persons, firms or corporations who have had nonwarranty auto repairs performed on Mercedes-Benz automobiles, owned or leased by them, by factory authorized Mercedes dealers, during the period March 27, 1970, to March 27, 1974."

The July 8 Order also provided for certification pursuant to Fed. R. Civ. P. 23(b)(1), 23(b)(2) and 23(b)(3). Thereafter, the defendants moved the court to amend the July 8, 1975, Order to stay all proceedings and certify that an immediate appeal is warranted under 28 U. S. C. § 1292(b).[1]

Following a conference with counsel an Order was entered on August 8, 1975, which vacated the Order of July 8, 1975. The latter Order provided that the class action shall be maintained pursuant to Fed. R. Civ. P. 23(b)(3) only, eliminated the phrase "factory authorized" from the definition of the class, certified that an immediate appeal is authorized in accordance with 28 U. S. C. § 1292(b), stayed proceedings if the defendants within 10 days apply to the United States Court of Appeals for the Third Circuit for permission to appeal and stated that a Memorandum Opinion would be filed.

1. 28 U. S. C. § 1292(b) provides:

"(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order."

The first matter for consideration is whether the four mandatory requirements of Fed. R. Civ. P. 23(a) have been met. The test of this rule is as follows:

"(a) *Prerequisites to Class Action.* One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class."

The affidavits filed by the defendants state that the class will number approximately 300,000. The class is sufficiently numerous so that joinder of all members is not practicable. Defendants do not contest this point.

The second prerequisite is the existence of questions of law or fact common to the class. In this case the plaintiffs allege a nationwide conspiracy involving the two named defendants and Mercedes-Benz dealers [2] to fix prices for nonwarranty repair work and replacement parts. The plaintiffs contend that the defendants and dealers have circulated and agreed to abide by certain price lists pertaining to the prices to be charged for parts and the prices to be charged for performing designated items of repair work. The common questions for determination include: whether defendants combined and conspired to establish retail parts prices to be charged to the class by the dealers; whether defendants combined and conspired to establish designated labor times to be utilized by dealers in setting prices to the class for nonwarranty repairs of Mercedes-Benz vehicles; whether documents

2. The dealers are not parties to this litigation.

establishing prices for parts and the amount of designated labor time were circulated among the dealers; whether defendants enforced compliance by the dealers in regard to the prices for parts for designated labor time; whether the defendants conspired with the Mercedes-Benz National Dealer Council in regard to establishment of fixed prices for parts and designated labor time for repair work in the performance of nonwarranty auto repairs; whether the plaintiff class was harmed by the alleged acts of the defendants and whether the alleged acts of the defendants, if proved, violate the antitrust statutes of the United States. The defendants argue that commonality is lacking because this class action will encompass a vast number of separate transactions throughout the United States. However, the foregoing issues are common to the class and defendants' argument will be considered, *infra*, on the question of whether the common issues predominate over separate issues.

The third requirement of typicality of claims and the fourth requirement of adequacy of representation are sometimes considered together. *Ungar v. Dunkin' Donuts of America, Inc.*, — F. Supp. — (E. D. Pa. 1975), 1975-1 Trade Cases ¶ 60,204 at 65,781. I find that the claim of the plaintiffs as individuals is typical of the claims of the class, especially on the liability issue. I further find that the adequate representation requirement is met because the plaintiffs do not have interests antagonistic to the class and their attorney has a nationwide reputation for outstanding competence in this type of litigation.[3]

3. The high standing of plaintiffs' counsel is evident from a review of the following cases: *Aronson v. Board of Trade of the City of Chicago*, 372 F. Supp. 1349 (N. D. Ill. 1974), *Philadelphia Electric Co. v. Anaconda American Brass Co.*, 47 F. R. D. 557 (E. D. Pa. 1969), and *Lindy Brothers Builders, Inc., of Philadelphia v. American Radiator and Standard Sanitary Corp.*, 341 F. Supp. 1077 (E. D. Pa. 1972) vacated on other grounds 487 F. 2d 161 (3d Cir. 1973).

In addition to determining whether the four prerequisites of Fed. R. Civ. P. 23(a) are satisfied it must be determined if the class action is maintainable under the provisions of rule 23(b). Rule 23(b) has three subparts and if one of those subparts is applicable the matter may proceed as a class action. In the July 8, 1975, Order it was held that the class action could be maintained under all three subparts of rule 23(b). Initially this was done to give the trial court greater flexibility in dealing with an enormous class. However, since money damages are a substantial element of plaintiffs' claim and since declaratory and injunctive relief can be awarded in a (b)(3) action, the August 8, 1975, Order was entered to provide that the class action is maintainable only under (b)(3). A similar approach was taken in *Ungar v. Dunkin' Donuts of America, Inc., supra:*

> "We agree with Judge VanArtsdalen and Professor Moore. While there are very significant claims for declaratory and injunctive relief involved in the present case, we believe that the damage aspect is so important that (b)(2) certification would be inappropriate. Declaratory and injunctive relief can be awarded in a (b)(3) action which also carries with it greater safeguards."

In order to find that a class action is maintainable under rule 23(b)(3) the questions of law or fact common to the members of the class must predominate over questions affecting individual class members, and the class action must be a superior method for the fair and efficient resolution of the controversy. *Katz v. Carte Blanche Corporation*, 496 F. 2d 747 (3d Cir. 1974). It is on these issues that the defendants raise their most serious objections to the class action determination. The contention of the defendants is set forth in their brief as follows:

> "In summary, if the class action motion is granted this Court at trial will be faced with proof supposedly relating to a nationwide conspiracy between over 570 dealers and two companies, and the question of damages to some 300,000 plaintiffs, no one of whom has purchased more than a small amount of the millions of parts alleged to have been sold at fixed prices, and each of whom has had his repairs done in a different labor market."

Defendants contend that the question of damages for each individual class member is different in every case, and, therefore, the individual damage issues predominate over the common liability issue. Defendants further contend that the class action is not a superior method for resolving this dispute.

The most appropriate way to proceed in this case is to bifurcate the issues of liability and damages. Discovery on damages would be stayed pending a jury determination on liability. Of course, if the defendants prevail on the liability issue the case would terminate. If the plaintiffs prevail, then the court would direct the plaintiffs to submit proposals for the expeditious resolution of the damage issues. Obviously, the court is not going to hold 300,000 separate jury trials to determine the damages for each member of the class. What the court has in mind is that the plaintiffs should be given an opportunity to develop a method of proving damages which satisfies constitutional and procedural safeguards and still permits the efficient use of court time. For example, it may be possible to utilize a Master to calculate damages of individual class members. *Connecticut Importing Co. v. Frankfort Distilleries, Inc.*, 42 F. Supp. 225, 226-27 (D. Conn. 1940). Also, plaintiffs may be able to utilize expert

testimony,[4] statistical computations and computer analysis to simplify the proof of damages. In any event, the court has the right to decertify the class following a determination of liability against the defendants if the plaintiffs are unable to develop a method of proving damages which will permit the trial to proceed in an efficient manner. The use of bifurcated trials in antitrust cases has been approved in *Ungar v. Dunkin' Donuts of America, Inc., supra,* and *In re: Master Key Antitrust Litigation,* — F. Supp. — (D. Conn. 1975) 1975-1 Trade Cases ¶ 60,377. In 3B Moore's Federal Practice § 23.45[2] at page 23-758 it states:

> "The most frequently recurrent types of suits brought under (b)(3) are private treble-damage antitrust suits, and actions based on various types of securities frauds. In both series of cases, courts as a rule approach the problem of predominance from the point of view of the severability of the issues of liability and damages—whether the asserted statutory violations can be effectively adjudicated in a class proceeding independent from the proceeding in which individual damages would be assessed."

Here the defendants argument against class action certification is focused primarily on the problems of proving

4. 4 Wigmore, Evidence § 1230 (Chadbourn rev. 1972) states:

> "Where a fact could be ascertained only by the inspection of a large number of documents made up of very *numerous detailed statements*—as, the net balance resulting from a year's vouchers of a treasurer or a year's accounts in a bank ledger—it is obvious that it would often be practically out of the question to apply the present principle by requiring the production of the entire mass of documents and entries to be perused by the jury or read aloud to them. The convenience of trials demands that other evidence be allowed to be offered, in the shape of the testimony of a competent witness who has perused the entire mass and will state summarily the net result. Such a practice is well established to be proper."

damages. Therefore, I find that questions of law or fact common to the members of the class predominate on the issue of liability, and in the event liability is found against the defendant, a further determination will be made as to the continuation of the class action on the damage issue.

In determining whether the class action is a superior procedure for resolving the controversy, other possible procedures must be examined. The possibility of utilizing a test case, as was done in *Katz v. Carte Blanche Corporation, supra,* has been explored with counsel for plaintiffs and defendants. The case *sub judice* does not lend itself to test case treatment because the defendants insist on the protection against one-way intervention. Also, a nationwide conspiracy is alleged and to proceed on a test case involving plaintiffs who reside in the Eastern District of Pennsylvania may not necessarily encompass proof of a nationwide conspiracy.

There does not seem to be any unfairness in proceeding as suggested above. Unlike *Katz v. Carte Blanche Corporation, supra,* the defendants and their dealers should not be affected by a failure to pay repair bills, and the defendants have not raised that argument. In regard to efficiency, it would seem that a denial of the class action would be efficient in the sense of clearing the docket of this court, but that may result in a multitude of separate suits across the country. On the other hand, it is in the public interest to discourage price fixing through private antitrust litigation. In a case sustaining a national class action, involving anticompetitive practices with respect to library books, it was held that:

> "Upholding the national class action will facilitate private antitrust litigation and will discourage future [price fixing] conspiracy violations." *State of Illinois v. Harper and Row Publishers, Inc.,* 301 F. Supp. 484, 493 (N. D. Ill. 1969).

As a ground for denying class action status defendants assert that there is no pending action by the United States on the antitrust issues and that this is a factor which leads to the conclusion that class treatment is inappropriate. On this point, 3B Moore's Federal Practice ¶ 23.45[2] at page 23-671 states:

> "Where a private plaintiff elects to press a claim without the benefit of a previous investigation—and victory—by federal authorities, the genuine existence of a class of parties allegedly injured should be clearly shown. The matter of predominance of common questions in these cases is, however, likely to be less troublesome than other management problems, as the occasions will probably be rare where a private party seeks to represent a highly diverse group which was not subject to relatively uniform treatment. Where the claim to class status is more than colorable, courts have properly tended to grant that status, while stressing that the ruling can be modified, and making full use of techniques available to streamline the litigation."

Furthermore, there is no pending litigation involving the issues *sub judice,* and the concentration of litigation in the Eastern District of Pennsylvania is as convenient as anywhere considering the proximity of the defendants' main offices, the residences of the plaintiffs and the fact that Philadelphia counsel for both plaintiffs and defendants have expended considerable time in becoming familiar with the issues in this case. Considering all of the foregoing, the court finds that a class action proceeding, at least on the liability issue, is superior to other possible methods for resolving the controversy.

We now turn our attention to defendants' motion for authorization pursuant to 28 U. S. C. § 1292(b) for an

interlocutory appeal. An affirmative class action determination is not a final order and, therefore, is not appealable under 28 U. S. C. § 1291. *Katz v. Carte Blanche Corporation, supra.* While the grant of class action treatment is not reviewable under Fed. R. Civ. P. 54(b), it may be reviewable by mandamus if the District Court has acted outside its jurisdiction or disregards procedural safeguards. Assuming this court has acted within its jurisdiction and complied with the requisite procedure, then the grant of class action treatment under rule 23(b)(3) is reviewable only pursuant to 28 U. S. C. § 1292(b). As stated in *Katz v. Carte Blanche Corporation, supra,* at page 752:

> "Thus if there is any route open for the interlocutory review of the grant of class action treatment under rule 23(b)(3) in this circuit, it is only pursuant to 28 U. S. C. § 1292(b)."

Therefore, the question becomes should the case *sub judice* be certified for appeal under 1292(b). The statute sets forth the criteria to be considered by the District Court in exercising discretion to grant a § 1292(b) certification. There must be ". . . a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation . . . ." The plaintiffs in resisting 1292(b) certification quote from the *Katz* case as follows:

> "A controlling question of law must encompass at the very least every order which, if erroneous, would be reversible error on final appeal." (496 F. 2d 747 at 755)

However, in the same paragraph which contains the above-quoted sentence, Judge Gibbons rhetorically asks:

> "What remains is the question whether in order for one question to be 'controlling' must it be one which if decided erroneously would lead to a reversal on appeal?"

In answering this rhetorical question Judge Gibbons stated:

> "The key consideration is not whether the order involves the exercise of discretion, but whether it truly implicates the policies favoring interlocutory appeals. The determination of what orders are properly reviewable under § 1292(b) must be made by a practical application of those policies, not by a mechanical application of labels such as 'discretionary' or 'non-discretionary.' Those policies, both before and since the enactment of § 1292(b) have included the avoidance of harm to a party pendente lite from a possible erroneous interlocutory order and the avoidance of possibly wasted trial time and litigation expense."

From a practical standpoint I think the grant of class action status is of tremendous import to the defendants as well as to the class. There is considerable economic significance to the individual plaintiffs since they have agreed to underwrite the cost of notice to the 300,000 members of the class.[5] Therefore, the troublesome question in certifying the class involves the problems anticipated in proving damages on behalf of 300,000 separate class members. This argument was the basic contention

5. At oral argument on plaintiffs' motion to grant class action status, plaintiffs' counsel advised the court that the names and addresses of the owners of Mercedes-Benz automobiles for the years in question could be obtained from the Polk Company and that the proposed class was identifiable by name and address from such records. The court was impressed with the argument that the proposed class could be totally identified and that plaintiffs are willing and able to pay for the cost of giving notice.

made by the defendants to resist the certification of the class. The parties should not be subjected to the trial of an antitrust matter involving a class of 300,000 members if it is the judgment of the Third Circuit Court of Appeals that anticipated problems in proving damages render the certification inappropriate. Considering that question the district court has decided the problem can best be approached by bifurcating the issues of liability and damages. However, there is room for a substantial difference of opinion on that question. Some courts have rejected class action certification on the ground that a class of this type is unmanageable. *Ralston v. Volkswagenwerk, A. G.*, 61 F. R. D. 427 (W. D. Mo. 1973); *Boshes v. General Motors Corporation*, 59 F. R. D. 589 (N. D. Ill. 1973). Another instance where the huge size of a class has been a significant factor in holding a proposed class action to be unmanageable is *Hackett v. General Host Corp.*, 455 F. 2d 618 (3d Cir. 1972). On the other hand, numerous cases hold that sheer size of a class does not defeat the superiority of a class action. *In re: Master Key Antitrust Litigation, supra.*

Finally, it appears that if this case is appealed immediately the resolution of the dispute may be enhanced. If it is determined on appeal that this case is not suitable for class action treatment, the plaintiffs may elect not to pursue their remedies with the same vigor they would use if they were named class representatives. Even if they did, the scope of the proceedings would be substantially narrowed. On the other hand, if the grant of class action treatment is upheld and the court's comments on resolving the damage issue approved, the chances for settlement will be enhanced if defendants' counsel become convinced, following discovery, that the plaintiffs' chances of proving liability are good. In any event, it appears to the trial court that the certification of the class is a close

question of tremendous significance to the parties and that it would be helpful for the appellate court to review this decision. In certifying this appeal I have relied on the tests established in *Katz, supra,* especially the statement at 496 F. 2d 756 where it was held:

> "Commentators on the rule 23 amendments support the view that appeals certified pursuant to § 1292(b) are appropriate for testing whether suitability of class action treatment has been correctly determined . . . . As the foregoing discussion indicates, we agree with that view."

For the foregoing reasons, I certified the class action determination for appeal pursuant to 28 U. S. C. § 1292(b).

EDWARD N. CAHN
Edward N. Cahn, *J.*

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

—

No. 75-2195

—

JULES LINK and SOLOMON KATZ, on behalf of themselves and all others similarly situated,
Appellees

v.

MERCEDES-BENZ OF NORTH AMERICA, INC.,
AND
DAIMLER-BENZ AKTIENGESELLSCHAFT,
Appellants

—

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA
(D. C. Civil No. 74-771)

—

Argued April 22, 1976
Before: ALDISERT, FORMAN and WEIS, *Circuit Judges.*

—

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OPINION OF THE COURT.

(Filed July 22, 1976)

—

WEIS, *Circuit Judge.*

Whether an antitrust action with potentially 300,000 claimants is manageable as a class action is the question directed to us in this § 1292(b) appeal. We decline to answer on the ground that the matter is one entrusted to the discretion of the district court. A second query asks whether there may be separate juries utilized during the liability and damage phases of a bifurcated trial. In the absence of a definitive order on that subject by the district court, the inquiry is essentially a request for an advisory opinion, which we may not honor.

Plaintiffs Link and Katz owned Mercedes automobiles which were repaired at various times by authorized dealers. Believing the costs to be excessive, plaintiffs filed this suit under the Sherman and Clayton Acts alleging a conspiracy to fix prices. They requested a class action certification and sought injunctive relief as well as treble damages and attorneys' fees.

The plaintiffs contend that defendant Daimler-Benz A. G., the parent corporation located in West Germany,

and an American subsidiary, Mercedes-Benz of North America, conspired with Mercedes dealers in the United States to maintain high prices for nonwarranty repairs. It is alleged that there was an illegal agreement to base repair rates on artificially-maintained prices of parts and flat labor repair times set out in the manufacturer's manual.

Pursuant to Fed. R. Civ. P. 23(b)(3), the district court certified the plaintiff class, consisting of some 300,000 persons in the United States who had Mercedes cars repaired during the four years in question.[1] The court also stated two questions for appeal under 28 U. S. C. § 1292(b):

A. Whether it is proper to certify a class of approximately 300,000 members where the proof of damages will vary for each member of the class;

B. Whether there can be a bifurcated trial in this case of liability and damages with separate juries for each segment of the case.

A panel of this court allowed the appeal, and two weeks later the district court filed its "Memorandum Opinion" explaining the reasons for its belief that immediate appellate review was indicated.

We have held that a grant or denial of class action certification is not a final order and, hence, not appealable under our general jurisdictional statute, 28 U. S. C. § 1291. *Kramer v. Scientific Control Corp.*, — F. 2d — (Nos. 75-1673, 75-1849, 3d Cir. April 20, 1976); *Hackett v. General Host Corporation*, 455 F. 2d 618 (3d Cir.), *cert.*

1. The court's original order described the class ". . . all persons, firms or corporations who have had nonwarranty auto repairs performed on Mercedes-Benz automobiles, owned or leased by them, by factory authorized Mercedes dealers, during the period March 27, 1970 to March 27, 1974." But this "definition" was later amended by the deletion of the phrase "factory authorized."

denied, 407 U. S. 925 (1972). However, an interlocutory order of this nature may qualify for accelerated appeal under 28 U. S. C. § 1292(b):

> "When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order . . . ."

This Court does not follow a policy of freely accepting an appeal from the grant of a class action certification where such action is grounded in the discretionary power of the district court. We have taken the position that "[t]o qualify for interlocutory review in this circuit, a class certification decision must be attended by special factors which take it outside the ambit of the general rule. *Katz v. Carte Blanche Corp.*, 496 F. 2d 747, 756 (3d Cir.), *cert. denied*, 419 U. S. 885 (1974)." *Kramer v. Scientific Control Corp., supra*, slip at 4; *Ungar v. Dunkin' Donuts of America, Inc.*, 531 F. 2d 1211, 1213 (3d Cir.), *petition for cert. filed*, 44 U. S. L. W. 3645 (U. S. Apr. 10, 1976).

We recognize that class action determination has significant, practical effects on the litigation and an aggrieved party may have a very real interest in securing early appellate review. But the same considerations apply to many other types of interlocutory orders and we cannot sanction an erosion of the prohibition against "piecemeal" appellate review. Our constantly increasing caseload reinforces the other more philosophical reasons for that policy.

Further, as we noted in *Johnson v. Alldredge*, 488 F. 2d 820 (3d Cir. 1973), *cert. denied*, 419 U. S. 882 (1974), 28 U. S. C. § 1292(b) is not designed for review of factual matters but addresses itself to a "controlling question of law." In the cases which we have considered and reversed class action certification, there were other overriding legal issues: *e.g., Ungar v. Dunkin' Donuts, supra,* ("individual coercion" and tying arrangements); *Katz v. Carte Blanche, supra,* (superiority of test case in Trust in Lending context); *Kauffman v. Dreyfus Fund, Inc.*, 434 F. 2d 727 (3d Cir. 1970), *cert. denied*, 401 U. S. 974 (1971), (eligibility of class representative). Because Rule 23(c) provides that the district court's determination to permit a class action "may be conditional, and may be altered or amended before the decision on the merits," that determination, in and of itself, does not present a "controlling question of law" to which this court should be hospitable under § 1292. If the district court has qualms about determining a class, because it has a serious question whether it is "apply[ing] the correct criteria to the facts of the case," *Katz v. Carte Blanche Corp.*, 496 F. 2d at 756, (a) it should hesitate determining the class until reasonably assured of the correctness of its ruling and (b) it should not certify for § 1292(b) consideration without stating persuasive reasons why the particular class action question is so unusual as to demand the intervention of an appellate court. In affording immediate appellate review of "controlling questions of law," § 1292(b) was not designed to substitute wholesale appellate certainty for trial court uncertainty under circumstances where, as here, the Rule gives broad discretion to the district court to revise its class action determination at any time prior to the decision on the merits.

One other observation is in order. Section 1292(b) is not intended to grant the appellate courts power to give

advice on speculative matters. While counsel and the district court might believe it helpful to have the appellate court's view on proposed alternate courses of action, our jurisdiction extends only to orders of the district court. These orders must be definitive, effective, and in a posture capable of affirmance or reversal. Requesting that the Court of Appeals choose from a number of alternatives submitted is not the type of appeal envisioned by § 1292(b).

With these concepts in mind, we turn to an analysis of the case at hand. The district court's memorandum discusses the troublesome problems anticipated in proving the damages of 300,000 separate class members and notes that a number of courts have held a class of that size unmanageable. *See Ralston v. Volkswagenwerk A. G.*, 61 F. R. D. 427 (W. D. Mo. 1973), *Boshes v. General Motors Corp.*, 59 F. R. D. 589 (N. D. Ill. 1973). Contrary authority is also cited for the position that sheer size does not defeat the superiority of a class action. *In re: Master Key Antitrust Litigation*, M. D. L. Docket No. 45 (D. Conn., filed May 27, 1975), 1975-1 Trade Cases ¶ 60,377. However, earlier in the memorandum, the judge stated:

> ". . . in the event liability is found against the defendant, a further determination will be made as to the continuation of the class action on the damage issue."

The district court therefore has limited the scope of its decision by ordering that there will be: (1) a bifurcated trial on liability and damages, and (2) a re-examination of class certification before the damage phase begins.

We have some doubt that the anticipated difficulties of proving damages on behalf of the large class are actually before us. In any event, we conclude that the issue is not one which this Court should decide on interlocutory review.

It is obvious that the district court's concern—a justifiable and serious one—is with manageability. This is a practical problem, and primarily a factual one with which a district court generally has a greater familiarity and expertise than does a court of appeals. Consequently, it is an area in which the trial court must of necessity be granted a wide range of discretion. The housekeeping problems involved in notifying an extremely large group of people, reviewing replies, answering inquiries, and processing of claims as well as the effect on other cases on the court's docket, are all matters which can best be evaluated by the man on the scene. These are often difficult judgments and that fact has not been overlooked in the rules.

Rule 23(c)(1) provides that the determination must be made "as soon as practicable." That does not necessarily mean at the onset of the litigation. The designation should be made at a time when the trial court has had adequate opportunity to acquaint itself with the case and the complexities likely to be encountered in its disposition. Moreover, as we noted earlier, a class certification, once made, is not irrevocable. The rule in a pragmatic approach states that "an order under this section may be conditional, and may be altered or amended before the decision on the merits." Thus, after a determination of liability, the district court is free to decertify the class for a proper reason, and unmanageability would be such a circumstance.

The district court also has the option of creating subclasses if that appears helpful in handling the litigation. In short, the rule is flexible and recognizes that whether the case can be managed must be left to the informed discretion of the trial court which will manage it. There are no circumstances in this case which make manageability a controlling question of law, and we therefore will not answer the question submitted.

The second question certified by the district court is the propriety of having separate juries for each segment of the bifurcated trial. The court, however, entered no order directing separate juries and whether it will is a matter of pure speculation at this juncture. As the memorandum points out, the parties may be able to develop a method of proving damages which both satisfies legal standards and permits the efficient use of court time. The utilization of a master is a possibility. A jury waiver would not be unexpected in the damage phase of a trial where the evidence consisted only of the mechanical application of mathematical formulations. In short, the district court has asked for an advisory opinion on an interesting legal proposition but one which may never be invoked in this case. We must decline the invitation.

Accordingly, we remand this case to the district court.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 75-2195

JULES LINK and SOLOMON KATZ, on behalf of themselves and all others similarly situated

v.

MERCEDES-BENZ OF NORTH AMERICA, INC. and DAIMLER-BENZ A. G.,
Appellants

(D. C. Civil Action No. 74-771)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: ALDISERT, FORMAN and WEIS, *Circuit Judges*

JUDGMENT.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the cause is remanded to the district court in accordance with the opinion of this Court.

ATTEST:

THOMAS F. QUINN
Clerk

July 22, 1976

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 75-2195

JULES LINK and SOLOMON KATZ, on behalf of themselves and all others similarly situated,
Appellees

v.

MERCEDES-BENZ OF NORTH AMERICA, INC.,
AND
DAIMLER-BENZ AKTIENGESELLSCHAFT,
Appellants

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

(D.C. Civil No. 74-771)

Argued April 22, 1976

Before: ALDISERT, FORMAN and WEIS, *Circuit Judges.*

Reargued November 4, 1976

Before: SEITZ, *Chief Judge,* FORMAN, VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS and GARTH, *Circuit Judges.*

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OPINION OF THE COURT

(Filed February 11, 1977)

WEIS, *Circuit Judge.*

Whether an antitrust action with potentially 300,000 claimants is manageable as a class action is the question directed to us in this § 1292(b) appeal. We decline to answer on the ground that the matter is one of fact subject to determination by the district court. A second query asks whether there may be separate juries utilized during the liability and damage phases of a bifurcated trial. In the absence of a definitive order on that subject by the district court, the inquiry is essentially a request for an advisory opinion, which we may not honor.

Plaintiffs Link and Katz owned Mercedes automobiles which were repaired at various times by authorized dealers. Believing the costs to be excessive, plaintiffs filed this suit under the Sherman and Clayton Acts alleging a conspiracy to fix prices. They requested a class action certification and sought injunctive relief as well as treble damages and attorneys' fees.

The plaintiffs contend that defendant Daimler-Benz A.G., the parent corporation located in West Germany, and an American subsidiary, Mercedes-Benz of North America, conspired with Mercedes dealers in the United States to maintain high prices for nonwarranty repairs. It is alleged that there was an illegal agreement to base repair rates on artificially-maintained prices of parts and flat labor repair times set out in the manufacturer's manual.

Pursuant to Fed. R. Civ. P. 23(b)(3), the district court certified the plaintiff class, consisting of some 300,000 persons in the United States who had Mercedes cars repaired during the four years in question.[1] The court also listed as controlling questions of law under 28 U.S.C. § 1292(b):

1. The court's original order described the class: ". . . all persons, firms or corporations who have had nonwarranty auto repairs

A. Whether it is proper to certify a class of approximately 300,000 members where the proof of damages will vary for each member of the class;

B. Whether there can be a bifurcated trial in this case of liability and damages with separate juries for each segment of the case.

A panel of this court allowed the appeal, and two weeks later the district court filed its "Memorandum Opinion" explaining the reasons for its belief that immediate appellate review was indicated.

We have held that a grant or denial of class action certification is not a final order and, hence, not appealable under our general jurisdictional statute, 28 U.S.C. § 1291. *Kramer v. Scientific Control Corp.*, 534 F.2d 1085 (3d Cir. 1976); *Hackett v. General Host Corporation*, 455 F.2d 618 (3d Cir.), *cert. denied*, 407 U.S. 925 (1972). However, an interlocutory order of this nature may qualify for accelerated appeal under 28 U.S.C. § 1292(b):

> "When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order . . . ."

This Court does not follow a policy of freely accepting an appeal from the grant of a class action certification

1. (Cont'd.)
performed on Mercedes-Benz automobiles, owned or leased by them, by factory authorized Mercedes dealers, during the period March 27, 1970 to March 27, 1974." But this "definition" was later amended by the deletion of the phrase "factory authorized."

where such action is grounded in the discretionary power of the district court. We have taken the position that "[t]o qualify for interlocutory review in this circuit, a class certification decision must be attended by special factors which take it outside the ambit of the general rule. *Katz v. Carte Blanche Corp.*, 496 F.2d 747, 756 (3d Cir.), *cert. denied*, 419 U.S. 885 (1974)." *Kramer v. Scientific Control Corp.*, 535 F.2d at 1087; *Ungar v. Dunkin' Donuts of America, Inc.*, 531 F.2d 1211, 1213 (3d Cir.), *cert. denied*, 45 U.S.L.W. 3250 (U.S. Oct. 4, 1976).

We recognize that class action determination has significant, practical effects on the litigation and an aggrieved party may have a very real interest in securing early appellate review. But the same considerations apply to many other types of interlocutory orders and we cannot sanction an erosion of the prohibition against "piecemeal" appellate review. Our constantly increasing caseload[2] reinforces the other more philosophical reasons for that policy.

Further, as we noted in *Johnson v. Alldredge*, 488 F.2d 820 (3d Cir. 1973), *cert. denied*, 419 U.S. 882 (1974), 28 U.S.C. § 1292(b) is not designed for review of factual matters but addresses itself to a "controlling question of law." In the cases where we have considered and reversed class action certification, there were other overriding legal issues: *e.g., Ungar v. Dunkin' Donuts, supra,* ("individual coercion" and tying arrangements); *Katz v. Carte Blanche, supra,* (superiority of test case in Truth in Lending context); *Kauffman v. Dreyfus Fund, Inc.*, 434 F.2d 727 (3d Cir. 1970), *cert. denied*, 401 U.S. 974 (1971), (eligibility of class representative). Because Rule 23(c) provides that the district court's determination to permit a class action "may be conditional, and may be altered or amended before the decision on the merits," that determination, in and of itself, does not present a "controlling

2. In eight years, 1969 to 1976 inclusive, the filings in our court have more than doubled, although the number of authorized judgeships has remained the same. On a national average the experience of the other courts of appeals has been similar.

question of law" to which this court should be hospitable under § 1292(b). If the district court has qualms about determining a class, because it has a serious question whether it is "apply[ing] the correct criteria to the facts of the case," *Katz v. Carte Blanche Corp.*, 496 F.2d at 756, (a) it should hesitate in determining the class until reasonably assured of the correctness of its ruling, and (b) it should not certify for § 1292(b) consideration without stating persuasive reasons why the particular class action question is so unusual as to demand the intervention of an appellate court. In affording immediate appellate review of "controlling questions of law," § 1292(b) was not designed to substitute wholesale appellate certainty for trial court uncertainty under circumstances where, as here, the Rule gives broad discretion to the district court to revise its class action determination at any time prior to the decision on the merits.

One other observation is in order. Section 1292(b) is not intended to grant the appellate courts power to give advice on speculative matters. While counsel and the district court might believe it helpful to have the appellate court's view on proposed alternate courses of action, our jurisdiction extends only to orders of the district court. These orders must be definitive, effective, and in a posture capable of affirmance or reversal. Requesting that the Court of Appeals choose from a number of alternatives submitted is not the type of appeal envisioned by § 1292(b).

With these concepts in mind, we turn to an analysis of the case at hand. The district court's memorandum discusses the troublesome problems anticipated in proving the damages of 300,000 separate class members and notes that a number of courts have held a class of that size unmanageable. *See Ralston v. Volkswagenwerk A.G.*, 61 F.R.D. 427 (W.D. Mo. 1973), *Boshes v. General Motors Corp.*, 59 F.R.D. 589 (N.D. Ill. 1973). Contrary authority is also cited for the position that sheer size does not defeat the superiority of a class action. *In re: Master Key Antitrust*

Litigation, M.D.L. Docket No. 45 (D. Conn., filed May 27, 1975), 1975-1 Trade Cases ¶ 60,377. However, earlier in the memorandum, the judge stated:

> "... in the event liability is found against the defendant, a further determination will be made as to the continuation of the class action on the damage issue."

The district court therefore viewed the scope of its order as limited and contingent. It contemplated—but did not order: (1) a bifurcated trial on liability, and (2) a reexamination of class certification before the damage phase begins.

We have some doubt that the anticipated difficulties of proving damages on behalf of the large class are actually before us. The district court mused that counsel might be able to devise methods of solving the problem before that time arrived, and listed several possibilities. In any event, we conclude that the issue is not one which this court should decide on interlocutory review.

It is obvious that the district court's concern—a justifiable and serious one—is with manageability. This is a practical problem, and primarily a factual one with which a district court generally has a greater familiarity and expertise than does a court of appeals. Consequently, it is an area in which the trial court must of necessity be granted a wide range of discretion. The housekeeping problems involved in notifying an extremely large group of people, reviewing replies, answering inquiries, and processing of claims as well as the effect on other cases on the court's docket, are all matters which can best be evaluated by the man on the scene. These are often difficult judgments and that fact has not been overlooked in the rules.

Rule 23(c)(1) provides that the determination must be made "as soon as practicable." That does not necessarily mean at the onset of the litigation. The designation should

be made at a time when the trial court has had adequate opportunity to acquaint itself with the case and the complexities likely to be encountered in its disposition. Moreover, as we noted earlier, a class certification, once made, is not irrevocable. The rule in a pragmatic approach states that "an order under this section may be conditional, and may be altered or amended before the decision on the merits." Thus, after a determination of liability, the district court is free to decertify the class for a proper reason,[3] and unmanageability would be such a circumstance.

The district court also has the option of creating subclasses if that appears helpful in handling the litigation. In short, the rule is flexible and recognizes that whether the case can be managed must be left to the informed discretion of the trial court which will manage it. There are no circumstances in this case which make manageability a controlling question of law, and we therefore will not answer the question submitted.

The second question certified by the district court is the propriety of having separate juries for each segment of the bifurcated trial. The court, however, entered no order directing separate juries and whether it will is a matter of pure speculation at this juncture. As the memorandum points out, the parties may be able to develop a method of proving damages which both satisfies legal standards and permits the efficient use of court time. The utilization of a master is a possibility. A jury waiver would not be unexpected in the damage phase of a trial where the evidence consisted only of the mechanical application of mathematical formulations.

A consideration important to our decision is that the case is in a preliminary stage. At the time the appeal was taken, the defendants had not yet filed their answers, the early skirmishing having been confined to discovery on jurisdictional issues. Those matters have since been resolved against the defendants, and the parties are now in

3. See 3B Moore's Federal Practice ¶ 23.01[11-4], ¶ 23.65.

a position to prepare the case on the merits. We believe that further development of the facts will aid the trial court in choosing among the alternative procedures discussed in its memorandum. By the time of the pretrial conference, the issues should be more sharply defined, and the district court may be in a better position to make positive rulings —rather than merely "thinking out loud," as its memorandum may fairly be characterized.

The better appellate practice is to rule on those issues which have been decided, and where a decision will "materially advance the ultimate termination of the litigation." We read the district court's order and memorandum as failing to meet those criteria. In short, we have been asked for an advisory opinion on an interesting legal proposition but one which may never be invoked in this case, *see Nickert v. Puget Sound Tug & Barge Co.*, 480 F.2d 1039 (9th Cir. 1973); *Control Data Corp. v. International Business Mach. Corp.*, 421 F.2d 323 (8th Cir. 1970). We must decline the invitation.[4]

Accordingly, we remand this case to the district court.

SEITZ, *Chief Judge*, Concurring

I believe that the majority have not adequately explained their refusal to answer either of the questions cer-

4. The dissents would prefer to take up the jury issue at this point rather than waiting for the district court to determine what procedures it will follow. Although the dissents conclude that the use of separate juries was a *sine qua non* of the class certification, we think it clear that it was but one of several possibilities, none of them finally determined, upon which the district judge speculated before entering his order. The precise point in the case at which the trial might be bifurcated is an important consideration, but not one to which the district court has yet directed its attention.

The majority believes that the dissents' discussion of these legal issues is premature in this case, and on this procedural point we differ. Therefore, even though some opinions are styled as dissents, their reasoning on those issues is not necessarily at variance with the views of a majority of this court.

tified by the district court. It is not incumbent upon the court to state reasons why it would or would not vote to accept an appeal under § 1292(b). Senate Report No. 2434, 85 Cong. 2d Sess., pp. 3, 4. However, I consider it useful to do so in this case, especially as a prior panel of our court granted permission to appeal.

There is an important distinction between the functions of the panel passing on the original request to allow an appeal under § 1292(b) and the panel which thereafter considers an appeal which has been allowed. The original panel is not required to do more than agree that the certified matter appears to be worthy of immediate appellate consideration. On the other hand, the panel which considers the matter after full briefing and consideration of the issues may well be in a better position to determine that what seemed proper for interlocutory review really should not be so reviewed.[1] I therefore do not consider the majority's present decision to be in impermissible conflict with the decision of the earlier panel. Nor do I say this because the matter is now considered in banc.

I.

The majority have refused to determine whether the class was properly certified because they fail to discern a "controlling question of law." I might agree with their conclusion were we untrammeled by precedent. However, in *Katz v. Carte Blanche Corp.*, 496 F.2d 747 (3d Cir.), cert. denied, 419 U.S. 885 (1974); a majority of this court sitting in banc held that whether a district court has committed an abuse of discretion in certifying a class is a controlling question of law for purposes of § 1292(b). I, nevertheless, concur in the majority's refusal to discuss the propriety of class certification, since there has not been a

1. The Court has now approved the following Internal Operating Procedure:

"The fact that a motion panel has permitted an appeal under 28 U.S.C. § 1292(b) does not, in any manner, bind or restrict the merits panel in its subsequent disposition of the appeal."

sufficient showing that the issues raised admit of a "substantial ground for difference of opinion." As the majority noted in *Katz,* it is unlikely that a district court would certify that there is "substantial ground for difference of opinion" as to the correctness of one of its orders unless it thought so. But it can hardly be assumed that district courts will always properly review the criteria mentioned in § 1292(b): as the majority stated in *Katz,* "[d]enial of permission to appeal may be based upon a different assessment than that of the district court as to any of the three [mentioned] criteria." 496 F.2d 747, 754.

Appellants have questioned the class certification order on several grounds,[2] including that the district court failed to properly identify the factors relevant to the class certification decision and that it abused its discretion in evaluating the factors which it did identify. But the only allegation of error which poses a substantial and out of the ordinary question is that the certification is invalid because it was premised on the assumption that the court could decertify the class after the initial stage of the proceedings.

Were it clear that the court did rest its decision on this assumption, I might conclude that there is "substantial ground for difference of opinion" as to the propriety of the class certification. But it is far from clear that the district court was thinking of decertification under F.R. Civ. P. 23(c)(1) rather than the possibility of holding bifurcated proceedings within the overall class action suit. The portion of the court's order which sets forth the "controlling questions of law" mentions a "bifurcated trial in this case of liability and damages," and does not mention decertification, which would seem to relegate proof of any damages to an entirely separate lawsuit. The court's Memorandum Opinion states that "[t]he most appropriate way to proceed in this case is to bifurcate the issues of liability and damages," and indicates how discovery would proceed in the event there was a finding of liability. While the court also said that it had the "right to decertify the class following a determination of liability against the defendants," it cited for this assertion *Ungar v. Dunkin' Donuts of America, Inc.,* 68 F.R.D. 65 (E.D. Pa. 1975), rev'd on other grounds, 531 F.2d 1211 (3d Cir.), cert. denied (1976), which refers to a bifurcated trial, not decertification. He also cites 3B Moore's Federal Practice Para. 23.45[2], which speaks generally of separate "proceeding[s]" for assessing individual damages, and does not specifically discuss decertification.

In sum, the question of whether the district court could decertify the class after the initial stage of the proceedings is not clearly before the court. Since the other allegations of error do not raise a "substantial ground for difference of opinion" within the statutory meaning and since this court has a legislative mandate to ensure that § 1292(b) does not undermine the proper scope of the finality rule, I conclude that we should not address the propriety of the class certification, even though that question, if entertained, might be easily disposed of. *See Milbert v. Bison Laboratories,* 260 F.2d 431 (3d Cir. 1958).

II.

The majority also decline to discuss whether it is permissible under the Seventh Amendment to have a bifurcated trial of liability and damages with separate juries for each segment of the case. Their decision is based on the fact that the district court has not at this point ordered such a trial. But I do not think this is a complete response to the issue posed, since one can still argue that the Seventh Amendment claim may be entertained on this appeal because it is raised by the class certification order.

I conclude that the Seventh Amendment problem should not be considered because it is not sufficiently implicated in the class certification decision. We should not consider the

2. On a proper appeal under § 1292(b), we would consider any issue relevant to our consideration of the order appealed from which had been "properly put in dispute by the parties." *Johnson v. Alldredge,* 488 F.2d 820, 823 (3d Cir. 1973).

Seventh Amendment questions which might inhere in decertification procedures, since, as noted, it is not clear that the court based its decision to certify on the assumption that it could decertify before proof of individual damages. Moreover, as to bifurcating the present action into liability and damage stages, the court's Memorandum Opinion mentions several techniques other than separate juries by which the proof of damages might be handled in a bifurcated proceeding, such as using a Master to calculate damage to individual class members, or using "expert testimony, statistical computations and computer analysis."

I therefore concur in the disposition by the majority if, as I understand it, the majority is vacating the earlier order of our court granting permission to appeal and remanding the case to the district court.

ADAMS, *Circuit Judge,* dissenting:

Had I been a member of the panel that was presented with the question whether to grant a certificate under section 1292(b), I might have voted against entertaining an interlocutory appeal. This is so because I believe that the position of this Court has been one of reticence in reviewing district court orders certifying suits as class actions, at least in the absence of an intertwined controlling legal issue.[1]

However, this case is now before us in a markedly different posture.[2] Permission to appeal was in fact granted,

1. *See, e.g.,* Kramer v. Scientific Control Corp., 534 F.2d 1085, 1087 (3d Cir. 1976); Ungar v. Dunkin' Donuts of America, Inc., 531 F.2d 1211, 1213 (3d Cir.), *cert. denied,* 45 U.S.L.W. 3250 (Oct. 4, 1976); Katz v. Carte Blanche Corp., 496 F.2d 747, 756 (3d Cir.) (en banc), *cert. denied,* 419 U.S. 885 (1974).

2. I thus agree with Chief Judge Seitz that "there is an important distinction between the function of the panel passing on the original request to allow an appeal under § 1292(b) and the panel which thereafter considers an appeal which had been allowed." Concurring opinion at A35.

a significant amount of time has elapsed since certification,[3] substantial efforts have been expended in proceedings before this Court, and it now appears that a serious and controlling legal question has emerged with respect to the issue of separate juries to try the liability and damage phases. Given these factors, it would seem to me to be improper to vacate, summarily, the grant of permission to appeal. Consequently, I believe that the Court should proceed to a consideration of the substantive points that have been tendered.

With respect to the first of appellants' contentions, the decision of the trial judge to certify this case as a class action, in my judgment, would not appear to be, at least on the facts available at this time, an abuse of discretion. However, I believe that it would have been preferable if he had undertaken the species of detailed analysis recommended by Judge Van Dusen.[4]

The thrust of the appellants' claim that the order of the district judge should be reversed appears to be that the suit is unmanageable as a class action. Yet, a district judge is ordinarily in a better position to determine whether class action treatment is appropriate on grounds of manageability, and his conclusion in that regard should not be disturbed in the absence of compelling circumstances. It is true that the contemplated class of 300,000 is an admittedly large one, but other cases have approved classes of comparable numbers. Moreover, the size of the class does not appear to make the substantive issues, at least in the lia-

3. The certificate by the district court was granted on August 7, 1975.

4. In Interpace Corp. v. City of Philadelphia, 438 F.2d 401, 404-07 (3d Cir. 1971) (dissenting opinion), I suggested that a district court should be required to make findings of fact as a precondition to the determination of a Rule 23 certification motion. Although the *Interpace* court held that such findings need not be made, that opinion does not bar such a procedure. And I remain convinced that it is the better practice for a district court to render findings of fact in ruling on class certification motions. This would seem especially so in a dispute as sizeable and vexing as the present case appears to be.

bility stage of the case, intractable. This would seem to be so because the central contention of the class representatives, so far as the merits of the controversy are concerned, is that the two principal defendants entered into a single conspiracy with their dealers to fix the cost of repairs.

As to the jury issue, I am in accord with Judge Gibbons that review of this problem would not, in the context of the case at hand, constitute an advisory opinion.[5] The trial judge did not speculate about using the device of a bifurcated trial and separate juries. Instead, a fair reading of the district judge's opinion indicates that the assumed propriety of that mechanism appears to have been one of the prime predicates of his decision to certify the case as a class action,[6] at least in the first instance. Inasmuch as the trial judge's determination turned in large measure on the plan to use separate juries, I believe that this Court should decide this issue.

Since the majority has chosen not to confront the jury problem, I do not believe that it would be appropriate, at

5. Rather than presenting a request for an advisory opinion, the jury issue poses a present, live controversy: The defendants claim that the class is not manageable because the class action procedure would deprive them of their right to a jury trial as prescribed by the Constitution. Plaintiffs contend that the class action is manageable, since class treatment will not trench on the constitutional right to a jury trial in view of the interpretation of that clause by the Supreme Court in *Gasoline Products Co. v. Champlin Refining Co.*, 283 U.S. 494 (1931). This, then, is a "controversy of sufficient concreteness" to warrant adjudication. McCahill v. Borough of Fox Chapel, 438 F.2d 213, 217 (3d Cir. 1971). And the parties appealing would appear to be "adversely affected" by a decision that a bifurcated trial may take place and separate juries used, as the trial court contemplates. Sierra Club v. Morton, 405 U.S. 227, 740 (1972).

6. *See* App. 159a, where the trial judge stated, "The most appropriate way to proceed in this case is to bifurcate the issues of damages and liability."

The latter portion of the district judge's opinion arguably does contain some indication that he might contemplate decertifying the case if the proposed procedure proved too unwieldy. But it would appear that use of the bifurcation device, with separate jury trials, was the linchpin of the trial judge's strategy for conducting the litigation as a class action.

least at this time, to set forth my views on the constitutionality of the separate jury procedure proposed by the district judge. Under the disposition of the appeal made today, it may well be that we will have to face this issue in the future. At that juncture, there will be ample opportunity to resolve definitively this difficult and important question, in light of the precise factual matrix in which the matter will then arise. The thorny problems of waiver and the possible designation of a master will by that time have been stripped away, and a direct encounter with the issues in a more pristine form will be possible.[7]

Judge Rosenn joins in this opinion.

VAN DUSEN, *Circuit Judge,* dissenting.

I respectfully dissent from the majority opinion's holding that a district court order, which certifies a class and adopts a bifurcated trial of a private civil antitrust action for treble damages under 15 U.S.C. § 15, does not qualify under 28 U.S.C. § 1292(b). My dissent is based on the district court's failure to make findings or show consideration of these factors,[1] among others:

7. Moreover, the Supreme Court has admonished that we should not decide constitutional issues when it is not essential to do so. *See, e.g.,* Hagans v. Lavine, 415 U.S. 528, 543 (1974); Alma Motor Co. v. Timken-Detroit Axle Co., 329 U.S. 129, 136-37 (1946). *See also* Allen v. Aytch, 535 F.2d 817, 819-20 (3d Cir. 1976).

1. The district court could not comply with the F.R. Civ. P. 23(b)(3) requirement that it exercise an "informed judgment" as to the "superiority" of class treatment without considering these factors. See *Katz v. Carte Blanche Corporation,* 496 F.2d 747, 756 (3d Cir. 1974). I believe that findings of the type made by the district court in *Windham v. American Brands, Inc.,* 68 F.R.D. 641 (D. S.C. 1975), *appeal pending en banc* (4th Cir., No. 75-2315, order of 12/13/76), were required in order to certify the class in this case. See pages 28-32 of the dissenting opinion of Judge Gibbons and authorities there cited, including § 4 of the Clayton Act, 15 U.S.C. § 15.

(a) that the liability aspect of the trial required a decision not only of violation of §§ 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2, but also determination under 15 U.S.C. § 15 of the fact of damage [2] (an element which would give rise to problems in proving the latter item on a class basis where the class consists of "potentially 300,000 claimants" located in all 50 states, Puerto Rico, Guam, and the Virgin Islands);

(b) that there would be a substantial difference in the quantum and character of liability proof under § 4 of the Clayton Act, 15 U.S.C. § 15, if the plaintiffs included all the above 300,000 individuals alleged to comprise the class, rather than only the named plaintiffs;

(c) that determination of liability itself under § 1 of the Sherman Act might also vary as to each class member, depending upon whether the particular dealer-defendant participated in the conspiracy, so that inquiry is required into whether the common questions predominate over the individual questions making a class action superior under F.R. Civ. P. 23(b)(3);

(d) that, on this record, there would appear to be no theoretical or practical formula or method to aid in the computation of damages sustained by different individuals, potentially requiring each class member to

2. See 15 U.S.C. § 15; *Pitchford v. Pepi, Inc.*, 531 F.2d 92, 98-99, 104-05 (3d Cir. 1976); *Deaktor v. Fox Grocery Co.*, 475 F.2d 1112, 1116-17 (3d Cir. 1973); and cases in note 29 of Judge Gibbons' opinion. As noted by Judge Gibbons at page A60 of his opinion, the Fifth and Ninth Circuits have ruled that class certifications may be improper in cases brought under § 4 of the Clayton Act, 15 U.S.C. § 15. See *Shumate & Co., Inc. v. National Association of Securities Dealers, Inc.*, 509 F.2d 147, 155 (5th Cir. 1975), and *In Re Hotel Telephone Charges*, 500 F.2d 86, 89-90 (9th Cir. 1974).

produce voluminous documentary evidence of his transactions in order to secure judgment;

(e) that, in view of the above, there is a question as to whether the named plaintiffs are typical as required by F.R. Civ. P. 23(a)(3); [3]

(f) that, if more than one class is necessary, the named plaintiffs might not adequately represent many members of the group of 300,000 persons treated as members of various classes and subclasses by the district court, see F.R. Civ. P. 23(d)(4); and

(g) that class suits have an *in terrorem* effect in forcing settlement (*cf. Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 740-42 (1975)).

This court has consistently recognized that if the district court "has not properly identified the issues and not properly evaluated which are common, the [district court order] is not entitled to such deference." *Katz v. Carte Blanche Corporation*, 496 F.2d 747, 756-57 (3d Cir. 1974), and cases there cited,[4] where Judge Gibbons also quoted Professor Moore as follows (at 757):

> " 'In determining whether an action brought as a class action is to be so maintained the trial court should carefully apply the criteria, set forth in Rule 23 . . . , to the facts in the case; and if it fails to do so its determination is subject to reversal by the appellate court when the issue is properly before the latter court.' "

3. The district court apparently accepted the unlikely theory of a single "co-conspirator"—the National Dealer Council—and did not identify the "common" issues sufficiently to make a proper typicality determination. It is quite possible there will be two classes—one being those who dealt with dealers who participated in the conspiracy and the other being those who dealt with dealers who did not participate in the conspiracy.

4. See note 1 above; *compare*, for example, *Baerga v. Richardson*, 500 F.2d 309, 312-13 (3d Cir. 1974).

I agree with part I of Judge Gibbons' opinion.[5] As to part II, I do not believe that class action treatment is permissible on this record, where a "§ 4 damage action charging price fixing" is involved (see page 32 of Judge Gibbons' opinion), although I agree with Judge Gibbons that the Seventh Amendment is no bar to a bifurcation of the trial in this case. In view of *Bruszewski v. United States,* 181 F.2d 419 (3d Cir. 1950), a bifurcated trial of the § 1 Sherman Act claim apparently can be more appropriately tried in a test action brought by the named plaintiffs. See *Katz v. Carte Blanche Corporation,* 496 F.2d 747, 759-61 (3d Cir. 1974) (en banc).

I would vacate the district court order and remand for district court (1) consideration of the factors mentioned above in light of the antitrust issues set forth in Judge Gibbons' opinion, and (2) appropriate findings and conclusions after such consideration.

GIBBONS, *Circuit Judge,* dissenting.

I. DISMISSAL OF THE APPEAL

This is an appeal, pursuant to 28 U.S.C. § 1292(b),[1] of an order of the district court determining that the suit in question could be maintained as a Fed. R. Civ. P. 23(b)(3) class action. Plaintiffs seek to represent a class of all persons, firms, or corporations who owned or leased a Mercedes-Benz automobile during the period from March 1970 to March 1974, and had non-warranty repairs performed by authorized Mercedes dealers during that period. The defendants are Daimler-Benz A.G., the West German auto-

5. The special factors contemplated by *Ungar v. Dunkin' Donuts of America, Inc.,* 531 F.2d 1211, 1213 (3d Cir. 1976), include the district court's failure to apply the criteria in F.R. Civ. P. 23 to the antitrust law issues pointed out in Judge Gibbons' opinion and its failure to make findings of the type in *Windham, supra.*

1. See note 8 *supra.*

mobile manufacturer, and its wholly-owned United States distributor, Mercedes-Benz of North America, Inc. The complaint charges that the defendants conspired with individual Mercedes retail dealers, referred to as co-conspirators but not named as defendants, to fix the retail prices of parts and the flat labor repair times for non-warranty repairs, in violation of § 1 of the Sherman Act. 15 U.S.C. § 1. The complaint seeks on behalf of the class both money damages under § 4 of the Clayton Act [2] and injunctive relief under § 16 of the Clayton Act.[3]

A substantive element of the § 4 cause of action is proof of actual injury to the business or property of each plaintiff resulting from the alleged violation.[4] Since the § 4 cause of action is for money damages the defendant is entitled to,

2. Section 4 of the Clayton Act, 15 U.S.C. § 15 provides:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

3. Section 16 of the Clayton Act, 15 U.S.C. § 26 provides:

> Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18 and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue. . . .

4. *E.g.,* Deakton v. Fox Grocery Co., 475 F.2d 1112, 1116 (3d Cir. 1973), *cert. denied,* 414 U.S. 897 (1974); In re Hotel Telephone Charges, 500 F.2d 86, 89-90 (9th Cir. 1974); Shumate & Co., Inc. v. National Ass'n of Sec. Dealers, Inc., 509 F.2d 147, 155 (5th Cir. 1975).

and has demanded, a jury trial.[5] The injunctive remedy in § 16, on the other hand, requires only proof of threatened loss or damage.[6] Since the § 16 cause of action looks only to equitable relief it presents no jury trial issue.[7]

On September 9, 1974, the plaintiffs moved, pursuant to Fed. R. Civ. P. 23(c), for a class action determination. Affidavits filed in opposition to that motion suggest that there are approximately 300,000 members in the proposed class, that the individual Mercedes dealers number about 588, and that the number of different parts, the prices of which were allegedly fixed, is over 26,000. On July 8, 1975, the district court, without making any distinction between the § 4 damage claim and the § 16 claim for injunctive relief, entered an order that the action "shall be maintained as a class action pursuant to Fed. R. Civ. P. 23(b)(1), 23(b)(2) and 23(b)(3)." Upon the entry of that order defendants moved for an order amending the July 8, 1975 order, to provide that in the district court's opinion an immediate appeal is warranted under 28 U.S.C. § 1292(b) as it would materially advance the ultimate termination of the litigation.[8] Acting on that motion, on August 7, 1975, the district

5. *E.g.*, Beacon Theaters v. Westover, 359 U.S. 500, 504 (1959) ("right to trial by jury applies to treble damages suits under the antitrust laws.").

6. *See, e.g.*, Zenith Radio Corp. v. Hazeltine Research, 395 U.S. 100, 130-31 (1969).

7. *Id.; see, e.g.*, Florists' Nationwide Tel. Del. Net. v. Florists' Tel. Del. Ass'n, 371 F.2d 263, 271 (7th Cir. 1967); Upjohn Co. v. Schwartz, 117 F. Supp. 292, 293 (S.D. N.Y. 1953).

8. Section 1292(b) provides:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That

court vacated the July 8, 1975 order and entered a new order providing that the "action shall be maintained as a class action pursuant to Fed. R. Civ. P. 23(b)(3) [only]" and that an immediate appeal is authorized in accordance with § 1292(b).

In support of this August 7, 1975 order the district court filed an opinion. This opinion set forth common questions of law and fact which, in the court's belief, predominated over questions which were not common to the class members.[9]

> A prerequisite to a 23(b)(3) class action is the existence of questions of law or fact common to the class . . . .
>
> The common questions for determination include: [1] whether defendants combined and conspired to establish retail parts prices to be charged to the class by the dealers; [2] whether defendants combined and conspired to establish designated labor times to be utilized by dealers in setting prices to the class for non-warranty repairs of Mercedes-Benz vehicles, [3] whether documents establishing prices for parts and the amount of designated labor time were circulated among the dealers; [4] whether defendants enforced compliance by the dealers in regard to the prices for parts for designated labor time; [5] whether the defendants conspired with the Mercedes-Benz National Dealer Council in regard to establishment of fixed prices for parts and designated labor time for repair work in the performance of nonwarranty auto repairs; [6] whether the plaintiff class was harmed by the alleged acts of the defendants and whether the alleged

8. (Cont'd.)

> application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

9. *See* Fed. R. Civ. P. 23(b)(3); Katz v. Carte Blanche Corporation, 496 F.2d 747, 756-57 (3d Cir.), *cert. denied,* 419 U.S. 885 (1974).

acts of the defendants, if proved, violate the antitrust statutes of the United States.[10]

It can be seen immediately that questions (1) through (5) go to the establishment of a § 1 Sherman Act violation. But proof of such a violation does not establish civil liability under § 4 or § 16 of the Clayton Act. There must under § 4 be proof of injury to business or property,[11] and under § 16 proof of threatened loss or damage.[12] Awareness of the distinction between acts which violate § 1 of the Sherman Act, and the elements which establish liability in private party litigation under § 4 and § 16 of the Clayton Act is vital. A conspiracy to establish *maximum* price fixing, for example, would clearly violate the Sherman Act,[13] but would not be a cognizable action under § 4 on behalf of retail consumers since they would have suffered no injury as a result of such acts.

In the district court opinion the only fact question referring to the essential element of either private cause of action is question (6), "whether the plaintiff class was harmed by the alleged acts." The formulation of this question, however, demonstrates the court's misapprehension of the nature of § 4 liability in a Rule 23(b)(3) context, for obviously only individual members of the class, not the class, can be injured in business or property by a retail price fixing conspiracy.[14] This misapprehension is further reflected in the district court's statement that a common legal question included: "whether the alleged acts of the defendants, if proved, violate the antitrust statutes of the

10. App. 157a.

11. See note 4 *supra*.

12. See note 6 *supra*.

13. *See, e.g.*, Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211, 213 (1951).

14. *See* In re Hotel Telephone Charges, *supra*, 500 F.2d at 89-90; Shumate & Co., *supra*, 509 F.2d at 155; Eisen v. Carlisle and Jacquelin, 479 F.2d 1005, 1112-14 (2d Cir. 1974), vacated on other grounds, 417 U.S. 156 (1974).

United States."[15] The only substantive antitrust statute alleged to have been violated is § 1 of the Sherman Act. That a price fixing conspiracy, if proved, violates § 1, hardly seems an open legal question.[16]

The analytical deficiencies of the district court's approach are further revealed later in its opinion, when it writes: "I find that the claim of the plaintiffs as individuals is typical of the claims of the class, especially on the liability issue."[17] This statement is interesting since the court has never properly identified the liability issue. Possibly what was intended was a reference to the Sherman Act § 1 violation. Certainly there is nothing in the district court opinion, or in the affidavits which have been called to our attention, suggesting that the conspiracy had a like effect upon the business or property of every repair customer of all 588 individual Mercedes dealers.[18] It is arguable that proof of the mere existence of the conspiracy might suffice to establish threatened loss or damage, and

15. App. at 157a.

16. *See, e.g.*, Deakton v. Fox Grocery Co., *supra*, 475 F.2d at 1116 (collecting cases).

17. App. at 158a.

18. Assuming that such a price fixing conspiracy did exist, its impact upon the various class members would in all likelihood not present common questions of fact. To illustrate, assume that pursuant to the alleged conspiracy a given Mercedes dealer charged standard labor times for all repair work and that these time charges exceeded the actual time required to perform such repair work. Assume also, that the dollar rate charged per unit of labor time was such that when applied to the standard labor time the price actually charged for a given repair was lower than the competitive price charged within the dealer's geographic market for the same repair work. The customers of such a dealer would not have been injured as a result of the conspiracy and therefore that dealer's customers could not assert a § 4 claim against the defendants. Given 588 individual dealers, and thousands of different parts and labor rates, it is almost impossible to view the question of liability as being a common question since such liability determinations necessarily involve the question of impact of the conspiracy upon each individual class member.

thus to sustain injunctive relief under § 16.[19] But the district court opinion draws no such distinction, and its discussion is focused primarily on establishing liability under § 4 rather than § 16. The district court's misconception of the substantive elements of § 4 liability are clearest in its treatment of the distinction between § 4 "liability" and "damages." Nowhere does the court show an awareness that some degree of injury to business or property—damages if you will—is a substantive element of § 4 liability. The court, however, recognizing that some proof of the amount of the overcharges resulting from the conspiracy will have to be proved at some point, and that the necessity for such proof has something to do with the class action determination, concludes:

> [T]he troublesome question in certifying the class involves the problems [sic] anticipated in proving damages on behalf of 300,000 separate class members. This argument was the basic contention made by the defendants to resist the certification of the class. The parties should not be subjected to the trial of an antitrust matter involving a class of 300,000 members if [the] . . . anticipated problems in proving damages render the certification inappropriate. Considering the question the district court has decided the problem can best be approached by bifurcating the issues of liability and damages.

Despite the majority opinion of this court, it is clear beyond dispute that the district court's decision in favor of Rule 23(b)(3) class action certification was based upon a decision to try the liability and damage issues before *separate* juries. In its order of August 7, 1975—the order which we are reviewing—the district court in certifying its class action determination for § 1292(b) review, stated:

19. See note 6 *supra*.

> 7. The undersigned is of the opinion that an immediate appeal from this Order is authorized by 28 U.S.C. § 1292(b), in that:
>
> 1. It involves controlling questions of law as to which there is substantial ground for difference of opinion, namely
>
> . . .
>
> B. Whether there can be a bifurcated trial in this case of liability and damages with separate juries for each segment of the case; . . .

Disingenuously, the majority suggests that because the district court has not yet entered a formal order providing for a trial before separate juries our discussion of the propriety of such a procedure would be an "advisory opinion."[20]

The district judge will surely be surprised to learn that this court's review of his conclusion on a proposition of law would amount to an advisory opinion. The decision to have separate juries for each segment of the bifurcated trial was an essential postulate of the district court's reasoning in support of its order granting class certification. It is clear beyond peradventure that the district judge would not have entered the class action order except for his belief in the legal proposition that he could try liability and damages in a § 4 Clayton Act case before separate juries.

Under 28 U.S.C. § 1292(b) this Court reviews an order which because it is appealable, is a judgment. Fed. R. Civ. P. 54(a). We do not review opinions or certified questions.[21] But when the district court advances a legal proposition in support of its judgment this court's review of the correctness of that legal proposition is not advisory. Such review is simply a natural consequence of reviewing any

20. Slip Opinion at 8.

21. *See, e.g.*, Katz v. Carte Blanche Corporation, *supra*, 496 F.2d at 754-56; Johnson v. Alldredge, 488 F.2d 820, 822-23 (3d Cir. 1973).

lower court judgment. We have repeatedly recognized that in a § 1292(b) appeal we consider any legal issues which suggest that the judgment before us can be affirmed or should be reversed.[22] The majority's reference to an "advisory opinion" is manifestly insupportable.

Equally insupportable is the majority's attempt to justify its unwillingness to decide the significant issue tendered by this appeal by reference to "[o]ur constantly increasing caseload."[23] In another context I have warned of the pernicious influence of the "fatigue" factor in appellate review.[24] In this instance that factor cannot be said to be even remotely relevant. For § 1292(b) appeals from class action determinations, while highly significant for the litigants and the district court in particular cases, are an insignificant part of the appellate caseload. A leading commentator writes:

> Though a good deal has been written about § 1292(b), numerically the statute has not been of great importance. In the fiscal year 1974 16,436 appeals were taken to the eleven courts of appeals. By contrast trial court certificates under § 1292(b) are made in only about 100 cases a year and the courts of appeals allow interlocutory appeal in about half of those 100 cases.
>
> Wright, Federal Courts 518-19 (3d ed. 1976) (footnotes omitted).

Since the holding in *Katz v. Carte Blanche Corporation, supra,* on March 15, 1974, that class action determinations may be reviewed by the § 1292(b) certificate route, the Third Circuit experience has not been different from the national experience to which Professor Wright refers. Between March 15, 1974 and December 31, 1976 the district courts in this Circuit have filed § 1292(b) certificates in 67 cases, of

22. *See id.*

23. Slip opinion at 4.

24. Lindy Bros. Builders, Inc. v. Am. Radiator, etc., 540 F.2d 102, 130 (3d Cir. 1976).

which 29 have been rejected and 35 granted by this court. But of the 67 petitions only five involved class action issues, and two of those were denied. The instant case is one of the three in which the petition was granted. The other two are *Braden v. University of Pittsburgh* (Civ. No. 75-1657, presently pending en banc); and *Ungar v. Dunkin' Donuts of America, Inc.,* 531 F.2d 1211 (3d Cir.), *cert. denied,* U.S. (1976). A parsimonious attitude toward our review of § 1292(b) appeals would have excluded these two highly significant cases. And the consequences might well have been waste of district court time and effort, and cost to the litigants vastly disproportionate to the time spent by this court in disposing of them. We cannot let our feeling of being overworked distort our sense of proportion. This appeal should be decided not dismissed.

II. The Merits

The legal issue which is inextricable from the merits of the district court's class action determination arises from the demand by defendants for a unitary jury trial of the § 4 Clayton Act damage claim. In making that demand the defendants rely upon the Seventh Amendment which, they urge, guarantees a trial before a single jury rather than separate juries as contemplated by the district court. But defendants somewhat overstate the reach of that Amendment. In the seminal case, *Gasoline Products v. Champlin Refining Co.,* 283 U.S. 494 (1931), the Supreme Court held that the Seventh Amendment right to jury trial is not abrogated when an appellate court orders a new trial only on one of the issues originally tried before a unity jury in the court below. The Court reasoned that the Seventh Amendment guaranteed a unitary jury trial only of issues, not of cases:

> Lord Mansfield, in applying the common law rule where the verdict, correct as to one issue, was erroneous as to another, said: ". . . for form's sake, we must set aside the whole verdict . . ." *Edie v. East*

India Co., 1 W. Bl. 295, 298. But we are not now concerned with the form of the ancient rule. It is the Constitution which we are to interpret; and the Constitution is concerned, not with form, but with substance. All of vital significance in trial by jury is that issues of fact be submitted for determination with such instructions and guidance by the court as will afford opportunity for that consideration by the jury which was secured by the rules governing trials at common law. See *Herron v. Southern Pacific Co., ante,* p. 91. Beyond this, the Seventh Amendment does not exact the retention of old forms of procedure. See *Walker v. Southern Pacific R. Co.*, 165 U.S. 593, 596. It does not prohibit the introduction of new methods for ascertaining what facts are in issue, see *Ex parte Peterson,* 253 U.S. 300, 309, or require that an issue once correctly determined, in accordance with the constitutional command, be tried a second time, even though justice demands that another distinct issue, because erroneously determined, must again be passed on by a jury. . . .

. . .

. . .

Here we hold that where the requirement of a jury trial has been satisfied by a verdict according to law upon one issue of fact, that requirement does not compel a new trial of that issue even though another and separable issue must be tried again.[25]

Defendants urge that the *Gasoline Products* holding is limited to *retrials* following an initial unitary jury trial of the entire case. They point out that in a recent class action opinion of this court we referred specifically to the problems of the right to a unitary trial[26] which is a question of first impression for this circuit.

25. 283 U.S. at 498-99.

26. Katz v. Carte Blanche Corporation, *supra*, 496 F.2d at 761.

Gasoline Products does not suggest that its distinction between issues as opposed to cases is limited to retrials, and given the analysis which the Court made, no Seventh Amendment policy suggests such a limitation. Thus, I agree with the Fifth and Tenth Circuits,[27] and with the commentators,[28] that the Seventh Amendment guarantees a unitary trial of issues, not of cases, even in the first instance.

That conclusion does not end the inquiry, however, for in *Gasoline Products* the Court also made it clear that a corollary to its distinction between issues and cases was the rule that any issues to be tried before separate juries must be clearly distinct and separable.

> Where the practice permits a partial new trial, it may not properly be resorted to unless it clearly appears that the issue to be retried is so distinct and separable from the others that a trial of it alone may be had without injustice.[29]

Such a rule is dictated for the very practical reason that if separate juries are allowed to pass on issues involving overlapping legal and factual questions the verdicts rendered by each jury could be inconsistent.

Defendants contend that the issues of liability and damages are so interwoven in a price fixing action seeking

27. Swofford v. B & W, Inc., 336 F.2d 406, 414-15 (5th Cir. 1964), *cert. denied*, 379 U.S. 962 (1965); *see* Union Carbide and Carbon Corp. v. Nisley, 300 F.2d 561, 589 (10th Cir. 1962). *Cf.* In re Master Key Antitrust Litigation, 528 F.2d 5, 14-15 (2d Cir. 1975).

28. Wright & Miller, Federal Practice and Procedure § 2391 at 303 (1971) states:

> "An argument that two juries may be used if one jury has first decided all the issues—though its verdict as to one of them has passed out of the case—but that two juries may not be used in the first instance seems untenable. The great guaranty of the Seventh Amendment will hardly support such a gossamer distinction."

29. 283 U.S. at 500.

damages under § 4 that they cannot be heard by separate juries. Admittedly, in an action under § 4 the task of defining which issues are so separate and distinct as to satisfy the test of *Gasoline Products* is complex. Since "liability" under § 4 necessarily includes proof of injury to business and property, bifurcation to separate juries of liability and damages in a § 4 case inevitably introduces the possibility that in the liability phase the first jury might find that there was such injury, while the second jury might on the same evidence of injury in the damage phase, find none.

A way out of this possibly constitutional dilemma in having separate juries hear overlapping issues in private antitrust class action was suggested recently by Judge Wyzanski while sitting by designation in the Fourth Circuit, in *Windham v. American Brands, Inc.*, 539 F.2d 1016 (4th Cir. 1976), *rehearing en banc granted* December 13, 1976. Recognizing the class manageability problems flowing from the necessity to prove both a Sherman Act § 1 violation, and the resulting impact of that violation in order to establish § 4 liability, he ordered that the trial issues be bifurcated between the Sherman Act § 1 violation and the injury to business or property. Bifurcating these issues eliminates problems of overlapping proof, since all evidence relating to the fact and extent of damages will be relegated to the second stage of trial. The first stage of the trial will be concerned only with the defendants' alleged violation of § 1.

This method of trial raises an issue of the propriety of allowing a class representative to establish that a defendant has committed a Sherman Act violation, without also proving, in the same trial, that he has been injured in his business or property. Such a class representative would have performed the role of a private attorney general by obtaining a violation holding benefiting all of the other class members, even though he has not yet met his burden in proving all of the elements of § 4 liability. Thus Judge

Wyzanski's procedure might result in a violation verdict on behalf of the class being established by a class representative who ultimately failed to prove injury to his business or property. Such a scenario is somewhat troubling because the language of § 4 suggests that private parties should not have standing to litigate Sherman Act violations unless they have been actually injured by those violations.[30]

Judge Wyzanski relies heavily on the analogy between his suggested bifurcation procedure and a private antitrust damage suit following a successful government antitrust suit.[31] In such a private action the judgment obtained by the government is prima facie evidence that the alleged defendants have violated the antitrust laws. 15 U.S.C. § 16(a).[32] The analogy to the government action is incomplete in two respects. First, if in the violation stage the case is maintained as a class action, the violation determination will be given a much greater effect than would a government judgment. While the government judgment is only prima facie evidence against a defendant in a later private damage action, the class action violation determina-

30. *See, e.g.*, The Cromar Co. v. Nuclear Materials & Equipment Corp., Civ. No. 75-2053 (3d Cir. filed September 24, 1976); Calderon Enterprises Corp. v. United Artists Theater Co., Inc., 454 F.2d 1292, 1295-96 (2d Cir. 1971), *cert. denied*, 406 U.S. 930 (1972). *See generally* Sherman, Antitrust Standing: From *Loeb* to *Malamud*, 51 N.Y.U. L. Rev. 374 (1976); Comment, Private Plaintiff's Standing Under Clayton Act Section 4, 7 Seton Hall L.R. 588 (1976).

31. 539 F.2d at 1020-21.

32. 15 U.S.C. § 16(a) provides:

> A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws or by the United States under section 15a of this title, as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: PROVIDED, That this section shall not apply to consent judgments or decrees entered before any testimony has been taken or to judgments or decrees entered in actions under section 15a of this title.

tion becomes law of the case, and eventually res judicata, in favor of or against all class members who have not opted out.[33] Secondly, the class representative is not a perfect analogy to the Justice Department, or even to a State attorney general.[34] Congress has not authorized a general roving commission for the enforcement of the antitrust laws. Instead, it has authorized private enforcement only by persons suffering actual or threatened injury to their business or property.[35] Under Judge Wyzanski's approach, however, a party who never really suffered any injury to his business or property might nevertheless obtain a violation determination having a more significant effect than a decree in a government action. Perhaps concern about such a possibility explains the Fourth Circuit's recent vote to rehear *Windham v. American Brands, Inc., supra,* en banc.

Even though the analogy between a class representative and the government is not complete in all respects I see no statutory or due process barriers to the use of Judge Wyzanski's procedure. Realistically, law firms are the prime movers in most consumer class actions. Any class representative who initiates an action under § 4 must still satisfy all of the threshold pleading requirements. If a law firm has a client on whose behalf it is willing to plead the necessary § 4 standing allegations there should be no objection to recognition of that client's standing to litigate a § 1 violation in a class action through a violation verdict. *See* Fed. R. Civ. P. 11. Permitting bifurcation between issues of violation and issues of injury to business or property seems to me perfectly consistent with the remedial purposes of Rule 23(b)(3).[36]

33. *See* Fed. R. Civ. P. 23(c)(3).

34. *See* § 301 of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, reprinted in 45 U.S.L.W. 139 (U.S. October 19, 1976).

35. See citations at note 30 *supra.*

36. Judge Seitz suggests that even though class decertification after a § 4 liability determination would present Seventh Amendment problems, they need not be discussed now since "it is not clear

Even under Judge Wyzanski's approach, management problems in the case *sub judice* would remain following a violation determination. If they were insurmountable the foregoing discussion would amount to no more than an academic exercise. They do not appear so to me. The chief source of the difficulty is the defendants' perfectly proper insistence upon a jury trial. If in an initial jury trial violation of the Sherman Act was established, the class members could be notified of that verdict and afforded the opportunity to file, with a designated depositary, claims for any injury they allege. The court could control discovery with respect to such claims, reserving to the defendant the right to try before a jury all those as to which the fact or amount of injury was disputed. Whether this involved one, several, or many juries would make no difference, since each jury would be passing upon a discrete set of issues.

Daimler and Mercedes contend that such an approach would ultimately involve the trial of several hundred

36. (Cont'd.)

that the court based its decision to certify on the assumption that it could decertify before proof of individual damages." He also argues that bifurcating the suit into liability and damage stages does not necessarily present Seventh Amendment problems since the district court has "several techniques other than separate juries by which the proof of damages might be handled in a bifurcated proceedings, such as using a Master to calculate damages to individual class members, or using 'expert testimony, statistical computations and computer analysis.'" Such reasoning reflects a misunderstanding of the Seventh Amendment problem, which is inherent in any decision to bifurcate liability and damages in a § 4 action where defendants demand a jury trial on both issues. The mandate of *Gasoline Products, supra,* cannot be satisfied if the possibility remains that two juries can decide differently on the same factual issue. Judge Seitz's further suggestion that the use of masters or statistical proof would avoid the reach of the Seventh Amendment is insupportable since such procedures cannot overcome a party's demand to a jury trial. *See* Fed. R. Civ. P. 53(e)(3), Ex parte Peterson, 253 U.S. 300 (1920); Eastern Fireproofing Co. v. United States Gypsum Co., 50 F.R.D. 140, 142 (D. Mass. 1970); 5A J. Moore, Federal Practice § 53.14[3], at 3037-38 (2d ed. 1975). *See generally* Dairy Queen, Inc. v. Wood, 369 U.S. 469, 478 n.18 (1962).

thousand separate fact issues. Certainly that would not be the case if they obtained a verdict in their favor on the issue of violation of § 1. If the verdict should go against them on that issue it does not seem overly likely that they will dispute, through trial, anything near that number of claims. But more to the point is the observation that if they have engaged in a price-fixing conspiracy there may well be several hundred thousand victims with potential claims. If the claims were pressed individually the court would have to hear them. At least if violation is established in a single trial individual claimants will not have to relitigate that part of the case. The district court did not think the multiplicity of claims presented an insurmountable problem. Neither do I.

This court has never definitively determined whether a Rule 23(b)(3) class action is available for a large class in a § 4 Clayton Act case. The Ninth Circuit, recognizing the difficulties presented by the statutory language of § 4, has in a § 1292(b) appeal held that class certification in such a case was improper. *In re Hotel Telephone Charges, supra,* 500 F.2d at 89-90. The Fifth Circuit, has also affirmed the denial of class action status in a § 4 case involving a large number of plaintiffs. *Shumate & Co., Inc., supra,* 509 F.2d at 155. District Court opinions present no consistent pattern.[37] The closest we have come to addressing the issue is Judge Aldisert's opinion in *Ungar v. Dunkin' Donuts of America, Inc., supra.* But *Ungar* is distinguishable because the violation alleged was not, as here, a price fixing conspiracy, but a tie-in. Our rejection of class action determination was based upon the conclusion that a substantive element of a tie-in violation was proof of individual coercion. Since individual coercion had to be shown we concluded that individual questions of proof predominated over common questions, even at the violation stage of the case.[38] A § 1 Sherman Act price fixing charge is an entirely different matter. Proof of a price fixing conspiracy establishes the violation regardless of its effect upon individual customers. Thus I would distinguish *Ungar,* and hold that class action treatment is permitted at least in a § 4 damage action charging price fixing.

37. Cases refusing class certification because of manageability problems: *see, e.g.,* Ralston v. Volkswagenwerk, A.G. 61 F.R.D. 427, 432 (W.D. Mo. 1973); Al Barnett & Sons, Inc. v. Outboard Maine Corp., 64 F.R.D. 43 (D. Del. 1974). Cases granting class certification in actions involving large numbers of individual plaintiffs: *see e.g.,* Hemley v. American Honda Motor Inc., 1975-2 Trade Cases ¶ 60,457 (S.D. N.Y. 1975); Arenson v. Board of Trade, 372 F. Supp. 1349 (N.D. Ill. 1974). *See generally* Federal Class Action Digests 1976 at 5-112 (J. McLaughlin ed. 1976).

My conviction that the approach outlined above is consistent with current Congressional intention with respect to antitrust enforcement is reinforced by an examination of the Hart-Scott-Rodino Antitrust Improvement Act of 1976 (Antitrust Improvements Act).[39] It should be recalled that in *Eisen v. Carlisle & Jacquelin, supra,* and *Zahn v. International Paper Co.,* 414 U.S. 291 (1973) the Court for all practical purposes precluded an interpretation of Rule 23 which would permit a fluid class recovery.[40] And, it had previously held that a state could not maintain a parens patriae suit on behalf of its residents. *Hawaii v. Standard Oil Co.,* 405 U.S. 251 (1972). Congressional reaction to these holdings was the enactment of § 301 of the Antitrust Improvements Act which amends § 4 of the Clayton Act by adding a provision permitting a State attorney general to bring a parens patriae class action on behalf of residents of his state to secure money damages authorized by § 4. The statute provides for proof of aggregate damages without the necessity of separately proving the individual claim of or amount of damage to persons on whose behalf the suit is brought. It also sets forth a method of distribution. Since the

38. *See* 531 F.2d at 1226.

39. See note 34 *supra.*

40. *See generally* Malina, Fluid Class Recovery as a Consumer Remedy in Antitrust Cases, 47 N.Y.U. L. Rev. 477 (1972).

§ 301 cause of action does not apply to injuries sustained prior to September 30, 1976 it is inapplicable to the instant suit.[41] But the enactment of a statute providing for a parens patriae class action with a fluid class recovery suggests to me that Congress would prefer an imaginative approach to class action litigation in § 4 cases.

I recognize that the argument based on the Antitrust Improvements Act can be turned against me by urging that the new § 301 cause of action occupies the field, and that its explicit nonretroactivity shows an intention not to extend the utilization of Rule 23 in the antitrust field. The message one reads into the enactment probably will be essentially a product of his own conviction as to the social desirability of consumer class actions. It seems to me that they serve as a useful adjunct to public enforcement.[42]

Class action treatment in this case presents no insurmountable Seventh Amendment problem. As to its manageability, we should, I think, defer to the district court which will be faced with the problem if a verdict establishing a § 1 violation is returned. I would affirm the order allowing the case to proceed as a Rule 23(b)(3) class action, but with a direction that the issue of violation of § 1 of the Sherman Act, rather than the issue of § 4 liability to the entire class, be tried to a separate jury.

41. *See* § 304 of the Antitrust Improvements Act.

42. *See generally* DuVal, The Class Action as an Antitrust Enforcement Device: The Chicago Experience (I) and (II), 4 & 5 American Bar Foundation Research Journal 1023 and 1274 respectively (1976).

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 75-2195

Jules Link and Solomon Katz, on behalf of themselves and and all others similarly situated

v.

Mercedes-Benz of North America, Inc. and Daimler-Benz A. G.,

Appellants

(D. C. Civil No. 74-771)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: SEITZ, *Chief Judge* and FORMAN, VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS and GARTH, *Circuit Judges*

JUDGMENT ON REHEARING.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel and later reargued before the Court en banc.

On consideration whereof, it is now here ordered and adjudged by this Court that the cause is hereby remanded to the District Court, in accordance with opinion of this Court.

ATTEST:

M. ELIZABETH FERGUSON,
Chief Deputy Clerk

February 11, 1977

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

—

No. 75-2195.

—

JULES LINK and SOLOMON KATZ, on Behalf of Themselves and All Others Similarly Situated

v.

MERCEDES-BENZ OF NORTH AMERICA, INC. and DAIMLER-BENZ A. G.,

Appellants.

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ORDER.

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Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is ORDERED that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby stayed until April 3, 1977.

JOSEPH F. WEIS, JR.
Circuit Judge.

Dated: February 28, 1977

CONSTITUTIONAL PROVISION, STATUTES AND RULES INVOLVED.

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UNITED STATES CONSTITUTION.

Seventh Amendment.

In suits at common law, where the value in controversy shall exced twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

SHERMAN ANTITRUST ACT, SECTION 1, 15 U. S. C. § 1.

§ 1. Trusts, Etc., in Restraint of Trade Illegal; Exception of Resale Price Agreements; Penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided*, That nothing contained in sections 1 to 7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section

45 of this title: *Provided further,* That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1 to 7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

CLAYTON ACT, SECTION 4, 15 U. S. C. § 15.

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Oct. 15, 1914, c. 323, § 4, 38 Stat. 731.

INTERLOCUTORY APPEALS ACT OF 1958, 28 U. S. C. § 1292(b).

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling

question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

FEDERAL RULES OF CIVIL PROCEDURE, RULE 23.

Class Actions.

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class

the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the

action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

As amended Feb. 28, 1966, eff. July 1, 1966.

FEDERAL RULES OF CIVIL PROCEDURE, RULE 42(b).

Separate Trials. The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues, always preserving inviolate the right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States.

IN THE

Supreme Court of the United States

October Term, 1976.

No. 76-1356.

MERCEDES-BENZ OF NORTH AMERICA, INC.
and DAIMLER-BENZ A. G.,

Petitioners,

v.

JULES LINK and SOLOMON KATZ, on Behalf of Themselves
and All Others Similarly Situated,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF STATUTORY CERTIORARI, AND, IN THE ALTERNATIVE, FOR A WRIT OF COMMON LAW CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AND MOTION FOR LEAVE TO FILE PETITION.

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INTRODUCTION.

The petitioners seek review of the refusal by a court of appeals to entertain an interlocutory appeal under 28 U. S. C. § 1292(b) from a class action determination by a district court. Such review is totally contrary to the intendment of that statute and may not be had. *Liberty Mutual Insurance Co. v. Wetzel,* 424 U. S. 737 (1976). Accordingly, none of the questions presented warrants review.

STATEMENT OF THE CASE.

I. Nature of the Case.

Respondents, Jules Link and Solomon Katz commenced this action on March 27, 1974 against petitioners, Mercedes-Benz of North America, Inc. ("MBNA") and Daimler-Benz A. G. ("DBAG"),[1] on their own behalf and on behalf of all persons who have had non-warranty repairs performed by authorized Mercedes dealers ("dealers") on Mercedes-Benz automobiles owned or leased by them during the period from March 1970 to the date of filing the Complaint.

The Complaint alleges that petitioners conspired with each other and with *certain* non-defendant co-conspirator dealers[2] to fix labor times and prices of parts for non-warranty repairs charged by dealers in violation of Section 1 of the Sherman Act, 15 U. S. C. § 1. The Complaint seeks both damages and injunctive relief under 15 U. S. C. §§ 4, 16.

DBAG is the manufacturer of the motor vehicles and motor vehicle parts bearing the Mercedes-Benz name and the three pointed star trademark. MBNA is the exclusive distributor of Mercedes-Benz motor vehicles and parts in the United States.

MBNA appoints dealers who sell Mercedes-Benz motor vehicles and parts and service such motor vehicles pursuant to standard form dealer agreements. (R214-224)[3] Included in the standard dealer agreements are provisions requiring dealers (a) to use in the repair and

1. MBNA is a wholly-owned subsidiary of DBAG.

2. The Complaint does not allege, as petitioners contend, that the conspiracy includes all dealers.

3. References to the Appendix in the Third Circuit, certified to this Court as the Record, are cited herein as "R".

servicing of Mercedes automobiles only Mercedes-Benz parts or parts expressly approved by DBAG if such parts are "necessary to the mechanical operation" of such automobiles, and (b) to agree to contribute an amount established by MBNA to the cost of the price list and maintenance service manuals, including labor time guides, provided to the dealers by MBNA.

While the current price list includes 26,000 *items*, in fact the number of actual *parts* is a small percentage thereof, and many models of a given part are sold at the same price. (R210-213) Moreover, different parts have the same "dealer net price", "suggested wholesale price", and "suggested list price". (R210-213) Also, markups are pronouncedly consistent. (R210-213)

The labor time guides direct dealers to:

> "Price the Repair Order—Use the time shown for each Complete and Related Operation. Determine the price by using the Computation tables." (R228)

All dealers attend district and zone meetings in the eight zones in the United States, called and attended by representatives of MBNA. At zone meetings dealers elect members of the National Dealer Council. The agenda for meetings of the National Dealer Council is made up from reports of the zone meetings. DBAG officers, as well as MBNA representatives, attend meetings of the National Dealer Council, and DBAG has final word on the action of the Dealer Council, at which such topics as prices are discussed.

II. Proceedings in the District Court.

Rather than answer the Complaint, petitioners on May 17 and 20, 1974, respectively, filed motions to dismiss

under Rule 12(b) [4] for lack of jurisdiction over the person, and improper venue and service of process.[5]

Pursuant to Local Rule 45 of the Eastern District of Pennsylvania, respondents on September 9, 1974 moved for class determination under each sub-section of Rule 23. After argument, the district court on July 8, 1975 entered an Order, granting the class motion. Upon petitioners' motion, the district court on August 7, 1975 entered an Order, without opinion,[6] vacating its July 8 Order, certfiying a class under Rule 23(b)(3) [7] and stating that the following issues were controlling questions of law under 28 U. S. C. § 1292(b):

> "A. Whether it is proper to certify a class of approximately 300,000 members where the proof of damage will vary for each member of the class;
>
> "B. Whether there can be a bifurcated trial in this case of liability and damages with separate juries for each segment of the case . . .". (A2)

Although the district court posed the second question, it did not order such a bifurcated trial.

The district court on September 25, 1975 filed a Memorandum Opinion setting forth the history of the class action motion and the findings supporting its determination. (A5-17) [8]

4. All references to a Rule or Rules are to the Federal Rules of Civil Procedure unless otherwise noted.

5. Those motions were denied on December 18, 1975.

6. The district court stated in that Order, "[A] Memorandum Opinion with the Court's findings will be filed hereafter." (A3) References to the Appendix to the Petition are cited herein as "A".

7. "The class herein is defined as all persons, firms or corporations who have had nonwarranty auto repairs performed on Mercedes-Benz automobiles, owned or leased by them, by Mercedes-dealers, during the period March 27, 1970 to March 27, 1974." (A1)

III. Proceedings in the Court of Appeals.

On August 15, 1975, petitioners filed a petition for leave to appeal pursuant to 28 U. S. C. § 1292(b), and respondents filed their answer thereto on August 22, 1975. On September 12, 1975, thirteen days *prior* to the Memorandum Opinion of the district court, the court of appeals granted petitioners permission to appeal.

A panel of the court of appeals on July 22, 1976, after reviewing the district court's Memorandum Opinion, unanimously declined to review the questions certified by the district court as did a majority of the court *en banc* on February 11, 1977.

IV. Proceedings in This Court.

On April 4, 1977, petitioners filed their petition for a writ of certiorari, and in the alternative, for a writ of common law certiorari pursuant to 28 U. S. C. §§ 1254(1) and 1651, respectively.

8. Although that Opinion states that "the most appropriate way to proceed in this case is to bifurcate the issues of liability and damages" (A10), the District Court did not order or even discuss a bifurcated trial with separate juries therein.

SUMMARY OF REASONS FOR DENYING THE WRIT.

The writ should be denied because:

1. Congress mandated that the determination to review an interlocutory order of a district judge under 28 U. S. C. § 1292(b) is vested in the sole discretion of the respective courts of appeals;

2. A class action determination is inappropriate for interlocutory review under 28 U. S. C. § 1292(b) since:

(a) it is discretionary,

(b) it is conditional and may be modified by the district court under Rule 23(c)(1), and

(c) it does not present a controlling question of law within the meaning of that statute; and

3. The district court did not order separate trials on the issue of liability and damages before different juries and hence any question concerning the right of trial by jury under the Seventh Amendment is hypothetical.

REASONS FOR DENYING THE WRIT.

I. The Refusal by a Court of Appeals to Entertain an Appeal Under 28 U. S. C. § 1292(b) Is Not Reviewable by This Court.

As the legislative history of 28 U. S. C. § 1292(b) [9] clearly demonstrates, a court of appeals may deny leave to appeal under that section for *any* reason, and indeed without stating any reason.

> "The granting of the appeal is also discretionary with the court of appeals which may refuse to entertain such an appeal in much the same manner that the Supreme Court today refuses to entertain applications for writs of certiorari.
>
> "It should be made clear that if application for an appeal from an interlocutory order is filed with the court of appeals, the court of appeals may deny such application without specifying the grounds upon which such a denial is based. It could be denied on the basis that the docket of the circuit court of appeals was such that the appeal could not be entertained for too long a period of time. But, whatever the reason, the ultimate determination concerning the right of ap-

9. "When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order."

peal is within the discretion of the appropriate circuit court of appeals." [10]

Congress clearly intended that the right to appeal under 28 U. S. C. § 1292(b) be finally determined by the respective courts of appeals. Thus, no "conflict" with other circuits within the meaning of Sup. Ct. R. 19.1(b) can exist. That some courts of appeals may choose to exercise their discretion sparingly, while others may more freely entertain appeals, is entirely within the contemplation of the statute.[11]

Indeed, this Court in *Liberty Mutual Insurance Co. v. Wetzel*, 424 U. S. 737, 747 (1976), cited at page 11 of the Petition, specifically noted the complete discretion of courts of appeals to accept or reject appeals under 28 U. S. C. § 1292(b) although the jurisdictional criteria of that statute have been met, stating:

> "There can be no assurance that had the other requirements of § 1292(b) been complied with, the Court of Appeals would have exercised its jurisdiction to entertain the interlocutory appeal."

10. S. Rep. No. 2434, 85th Cong. 2d Sess. 3, 4, set out in 1958 U. S. Code Cong. & Adm. News 5257.

11. Other circuits have similarly rejected appeals under 28 U. S. C. § 1292(b) of orders granting class action status. *E.g., Glenn v. Arkansas Best Corp.*, 525 F. 2d 1216, 1217 (5th Cir. 1976). And in *Tucker v. Arthur Andersen & Co.*, No. 75-8143 (2d Cir. June 19, 1975) review of class certification under 28 U. S. C. § 1292(b) was denied although the district court had urged therein, as petitioners here urge, that "[i]f the court's order were reversed, protracted and expensive litigation may very well be avoided . . . ." *Tucker v. Arthur Andersen & Co.*, 67 F. R. D. 468, 485 (S. D. N. Y. 1975). (That order appears in the Appendix hereto.)

II. Review by a Court of Appeals Under 28 U. S. C. § 1292(b) of an Order Which Is Both Discretionary and Conditional Should Not Be Permitted.

Courts of appeals have held that matters entrusted to the discretion of the district court are not reviewable under 28 U. S. C. § 1292(b). *E.g., J. C. Trahan Drilling Contractor, Inc. v. Sterling*, 335 F. 2d 65 (5th Cir. 1964); *Atlantic City Electric Co. v. A. B. Chance Co.*, 313 F. 2d 431 (2d Cir. 1963). Interlocutory appeal of a class certification, which not only involves the exercise of discretion but also "may be conditional, and may be altered or amended before the decision on the merits" [12], is even less appropriate. It would make a mockery of the "final judgment" rule if an appeal were permitted where the order from which appeal is sought is both discretionary and subject to modification.

III. No "Controlling Question of Law" Has Been Presented Within the Meaning of 28 U. S. C. § 1292(b).

To qualify for appeal under 28 U. S. C. § 1292(b) "[i]t is necessary . . . that the order involve a clear cut question of law against a background of determined and immutable facts". 9 *Moore's Federal Practice* ¶ 110.22[2] at p. 261.

As to the first question certified by the district court, regarding numerosity of the class, that question is, as the court of appeals correctly concluded, "primarily a factual one with which a district court generally has a greater familiarity and expertise than does a court of appeals." [13] The size of the class certified and the impact of class size on

12. Rule 23(c)(1).

13. A32.

the course of the litigation does not transmute the question of manageability from one of fact to one of law.[14]

Moreover, all of the findings of a district court in support of class certification under Rule 23(b)(3) are findings of fact. Rule 23(b)(3) provides, in pertinent part, that a class action is maintainable if "the court *finds* that questions of law or fact common to the members of the class predominate . . ." "The matters pertinent to the *findings* include . . ." (emphasis supplied). *The Manual for Complex Litigation*, § 1.40 at 21 n. 25 (West ed. 1973) states: "[The class action determination] normally involves the resolution of factual issues". See also *In Re Antibiotic Antitrust Actions*, 333 F. Supp. 291, 296 (S. D. N. Y. 1971):

> "[T]he court finds that these [class action] orders, particularly as they relate to the manageability issue do not present questions of law. The questions presented are factual in nature and concern the district judge's continuing exercise of the discretion vested in him by Rule 23."

The second question certified by the district court, the propriety of separate juries for each segment of a bifurcated trial, is, as the court of appeals correctly noted, entirely hypothetical. The district court entered no order directing separate juries, and whether it will do so is a

14. Many cases involving as many or more class members as herein have been certified as class actions. *E.g., Dennis v. Saks & Co.*, 1975-2 Trade Cases ¶ 60,396 (S. D. N. Y. 1975) (three subclasses, one with 100,000 members, another with 244,000 members, and a third with 269,000 members); *Sommers v. Abraham Lincoln Federal Saving & Loan Ass'n*, 66 F. R. D. 581 (E. D. Pa. 1975) (379,000 class members); *Hemley v. American Honda Motor Co., Inc.*, 1975-2 Trade Cases ¶ 60,457 (S. D. N. Y. 1975) (at least 500,000 to 1,000,000 class members); *Arenson v. Board of Trade*, 372 F. Supp. 1349 (N. D. Ill. 1974) (400,000 class members); *In re Antibiotics Antitrust Actions*, 333 F. Supp. 278 (S. D. N. Y. 1971) (estimated 4,850,000 class members). See also *Eisen v. Carlisle & Jacquelin*, 417 U. S. 156 (1974).

matter of pure speculation.[15] Accordingly, the court of appeals declined to give an advisory opinion, as have other courts of appeals faced with similar requests. See *Nickert v. Puget Sound Tug & Barge Co.*, 480 F. 2d 1039, 1041 (9th Cir. 1973); *Control Data Corp. v. International Business Machines Corp.*, 421 F. 2d 323, 325 (8th Cir. 1970).

Petitioners next advance the novel proposition that all certifications of "large" classes present controlling questions of law because of their alleged *in terrorem* effect on settlement.[16] Even if that effect did exist, what petitioners urge is that a district court cannot certify a class unless it finds that the claims asserted are meritorious. That inquiry is impermissible. *Eisen v. Carlisle & Jacquelin, supra*, at 177-178. Moreover, as the court noted in *Blackie v. Barrack*, 524 F. 2d 891, 899 n. 15 (9th Cir. 1975), *cert. denied*, — U. S. — (1976), there is no empirical evidence of any such effect. In fact, the empirical evidence that exists dictates a contrary conclusion. As that court stated:

> "The empirical evidence on the subject is very limited, and not particularly helpful because it provides no basis for comparison of class actions with other suits. For what it is worth, however, the empirical evidence indicates that a relatively high proportion of class actions are not settled, but disposed of in defendant's favor on preliminary motions. *See* Committee on Commerce, United States Senate, *Class Action Study*, 93d Cong., 2d Sess. (1974), Committee Print at 9-10. On the basis of the evidence before it, the Commerce Committee concluded that the class action was not a particularly effective vehicle for coercing settlements."

15. A33.

16. Petition, pp. 14-16.

The court went on to observe:

"Precisely the same power to coerce a settlement (and defeat review of potentially erroneous previous orders) is wielded by any plaintiff with a substantial claim—that fact alone does not generally confer appealability on an order which effectively requires a defense to a large claim."

524 F. 2d at 899.

"We note that the supposed *in terrorem* effect of the class certification will persist despite a right of immediate appeal—the claim may be frivolous and the class proper. Immediate appeal will eliminate only the improperly certified coercive class action, at the expense of both frivolous and non-frivolous, properly certified classes. It may well be better to attack the 'blackmail' problem directly with appropriate safeguards rather than collaterally undermining the final decision rule."

524 F. 2d at 899 n. 14.

"[W]e have no means of deciding whether the present hue and cry of 'blackmail' in fact reflects an abnormally high instance of unfairly coerced settlements, or is rather the pained outcry of defendants whose previously advantaged litigating position has been undermined, and who must now confront small claimants (who have been given the capacity to exert pressure proportionate to the magnitude of the total injury occasioned by defendant's alleged violation of the law) on more equal grounds."
524 F. 2d at 900.

The unfortunate impact of interlocutory appeals on the prosecution of class actions is apparent from the instant case in which the action was commenced on March 27,

1974, the district court certified the class on August 7, 1975 and now, almost three years after the action was commenced, and twenty-one months following the class certification, the class has yet to receive notice of the action. Class size is no excuse for such inordinate delay.

IV. The District Court Properly Certified the Class.

The existence and illegality of the conspiracy alleged are common issues of law and fact, as is the question of the circulation of documents establishing prices for parts and designated labor times.[17]

It is well established that when a price-fixing conspiracy is alleged, as herein, common questions of law or fact predominate over individual questions, making class certification appropriate.[18] *Robertson v. National Basket-*

17. Indeed, this Court in *United States v. Container Corp. of America*, 393 U. S. 333 (1969), held that the exchange of price information among competitors may, by itself, establish the existence of a price-fixing conspiracy in violation of Section 1 of the Sherman Act. Printing, publishing and circulating a price list by a trade association was held to establish the existence of a price-fixing conspiracy in *Plymouth Dealers' Ass'n. of Northern California v. United States*, 279 F. 2d 128 (9th Cir. 1960). See also, *Goldfarb v. Virginia State Bar*, 421 U. S. 773 (1975); *Interstate Circuit v. United States*, 306 U. S. 208 (1939); *United States v. Nationwide Trailer Rental System, Inc.*, 156 F. Supp. 800 (D. Kan. 1957). Moreover, membership in a trade association which held meetings where prices were discussed supports a finding of participation in an illegal price-fixing conspiracy. *Bray v. Safeway Stores, Inc.*, 392 F. Supp. 851 (N. D. Cal. 1975).

18. Impact of that price-fixing conspiracy on the class may be inferred: *In re Master Key Antitrust Litigation*, 528 F. 2d 5, 12 (2d Cir. 1975); *Lessig v. Tidewater Oil Co.*, 327 F. 2d 459, 471 fn. 31 (9th Cir.), *cert. denied*, 377 U. S. 995 (1964); *Phillips v. Crown Central Petroleum Corp.*, 1975-1 Trade Cases ¶ 60,335 (D. Md. 1975). See *In re Ampicillin Antitrust Litigation*, 55 F. R. D. 269 (D. D. C. 1972); *Illinois v. Harper & Row Publishers, Inc.*, 301 F. Supp. 484 (N. D. Ill. 1969).

For, as Judge Gibbons commented in *Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp.*, 540 F. 2d 102, 128 (3d Cir. 1976) (dissenting opinion): ". . . I have never heard of a price-fixing conspiracy aimed at reducing prices to consumers . . .

ball Ass'n, 1975-1 Trade Cases ¶ 60,168 at 65,546 (S. D. N. Y. 1975); *Herrmann v. Atlantic Richfield Co.,* 65 F. R. D. 585 (W. D. Pa. 1974); *Professional Adjusting Systems, Inc. v. General Adjustment Bureau, Inc.,* 64 F. R. D. 35 (S. D. N. Y. 1974); *Jacobi v. Bache & Co., Inc.,* 1972 Trade Cases ¶ 73,980 (S. D. N. Y. 1972); *City of Philadelphia v. American Oil Co.,* 53 F. R. D. 45 (D. N. J. 1971); *Sol S. Turnoff Drug Distributors, Inc. v. N. V. Nederlandsche Combinatie Voor Chemische Industrie,* 51 F. R. D. 227, 233 (E. D. Pa. 1970); *Illinois v. Harper & Row Publishers, Inc., supra; Minnesota v. United States Steel Corp.,* 44 F. R. D. 559, 572 (D. Minn. 1968).[19]

V. The Review of the Propriety of a Bifurcated Trial Before Separate Juries Would Be Inappropriate, and, in Any Event, That Procedure Is Constitutionally Permissible.

A. The District Court Did Not Order a Bifurcated Trial Before Separate Juries.

As the court of appeals correctly observed, the district court did not order a bifurcated trial of liability and damages before separate juries, nor did the district court indicate that such bifurcated trials were necessary. (A33-34) The use of that procedure in this action is, therefore, entirely conjectural. Accordingly, its constitutionality is not subject to review by this Court. *Government & C. E. O. C., CIO v. Windsor,* 353 U. S. 364, 366 (1957). As Mr. Justice Frankfurter noted in his concurring opinion in *Joint Anti-Fascist Refugee Committee v. McGrath,* 341 U. S. 123, 155 (1951):

> "Courts do not review issues, especially constitutional issues, until they have to. [citations omitted] In part, this practice reflects the tradition that courts, having final power, can exercise it most wisely by restricting themselves to situations in which decision is necessary."

19. See also discussion at pp. 17-18, *infra.*

In the recent opinion by the Second Circuit in *In re Master Key Antitrust Litigation, supra,* in which the appeal was dismissed for lack of jurisdiction, that court commented:

> "Appellants' final argument is that they will be prejudiced in their defense if the same jury does not hear both the liability and damage portions of the action. They also suggest that use of separate juries in those two trials might infringe their Seventh Amendment rights. Without in any way commenting on the validity of these arguments, we merely note that they are *wholly speculative* at this point. Judge Blumenfeld has indicated that one jury may hear both the liability and damage claims in this action. *Cf. Swofford v. B & W, Inc.,* 336 F. 2d 406, 415 (5th Cir. 1964), *cert. denied,* 379 U. S. 962 (1965). It would plainly be premature for us to rule on the appropriateness of using two juries where only one, in fact, may be involved. We should only note that bifurcated trials have frequently been employed with great success, *see* C. Wright & A. Miller, *supra* §§ 2390-91: *Green v. Wolf Corp.,* 406 F. 2d 291, 301 (2d Cir. 1968), *cert. denied,* 395 U. S. 977 (1969) (class action in securities litigation), even in antitrust suits, *see Goldfarb v. Virginia State Bar, supra.*" (emphasis supplied) 528 F. 2d at 15.

It is far from clear that a bifurcated trial will be necessary in this action. Moreover, even if that procedure should prove necessary, both trials could be had before the same jury (a procedure which is facilitated by the use of

alternate jurors), as was done in *Idzojtic v. Pennsylvania Railroad Co.*, 456 F. 2d 1228 (3d Cir. 1972); *Driver v. Phillips*, 36 F. R. D. 261 (E. D. Pa. 1964), and *Eastern Fireproofing Co. Inc. v. United States Gypsum Co.*, 50 F. R. D. 140 (D. Mass. 1970) (an antitrust action in which the court reconvened the same jury to determine damages more than two years following the trial on liability). If both trials are before one jury, bifurcation clearly does not present a constitutional issue.

B. A Bifurcated Trial Before Separate Juries Is Constitutionally Permissible.

If bifurcation and use of separate juries proves necessary (which is by no means likely), that procedure would not violate the Seventh Amendment right to jury trial.

This Court held in *Gasoline Products Co. v. Champlin Refining Co.*, 283 U. S. 494 (1931) that the constitutional right to jury trial is not abrogated when an appellate court orders a new trial on one of several issues unless the issue to be retried is inseparably interwoven with the remaining issues. Following *Gasoline Products* courts of appeals have reversed verdicts in a number of antitrust actions and remanded only the issue of damages. *E.g., Pitchford v. PEPI*, 531 F. 2d 92, 107, 111 (3d Cir.), cert. denied, — U. S. — (1976); *Woods Exploration & Producing Co., Inc. v. Aluminum Co. of America*, 509 F. 2d 784 (5th Cir.), *cert. denied*, 423 U. S. 833 (1975) (damage verdict sustained in an antitrust case in which that issue was tried separately on remand before a jury different from the one which heard and found liability); *Household Goods Carriers' Bureau v. Terrell*, 452 F. 2d 152 (5th Cir. 1971).

The issues of liability and damage in an action involving a price-fixing conspiracy are separate and distinct. Impact (or fact of damage as opposed to amount)

is inferred from the existence of the price-fixing conspiracy. See n. 18, *supra*.[20] As the Second Circuit held in *In Re Master Key Antitrust Litigation, supra:*

> "If the appellees establish at the trial for liability that the defendants engaged in an unlawful national conspiracy which had the effect of stabilizing prices above competitive levels, and further establish that the appellees were consumers of that product, we would think that the jury could reasonably conclude that appellants' conduct caused injury to each appellee. [citations omitted] The amount of such injury could then be computed at a separate trial for damages, and appropriate substratification of classes could be utilized to facilitate that determination." [citations omitted] 528 F. 2d at 12.

A bifurcated trial before separate juries of the issues of violation and damage, which issues clearly do not overlap, is, as suggested by Judge Gibbons (A62), likewise permissible.[21]

Finally, although irrelevant to the issue of a bifurcated trial before separate juries, petitioners suggest that the trial on damages would be unmanageable (Petition at p. 30). That argument has been rejected as a bar to class action certification. *E.g., Blackie v. Barrack, supra; Gold Strike Stamp Co. v. Christensen*, 436 F. 2d 791, 798 (10th Cir. 1970); *Green v. Wolf Corp.*, 406 F. 2d 291 (2d Cir. 1968), *cert. denied*, 395 U. S. 977 (1969); *In Re Master Key Antitrust Litigation*, 70 F. R. D. 23, 26 (D. Conn.), *appeal dismissed*, 528 F. 2d 5 (2d Cir. 1975); *Aamco*

20. See also *In Re Sugar Industry Antitrust Litigation*, 1977-1 Trade Cases ¶ 61,373 at 71,336-71,338 (N. D. Cal. 1976) and the cases cited therein.

21. See *Windham v. American Brands, Inc.*, 539 F. 2d 1016 (4th Cir. 1976) (case *sub judice*, following reargument before that court *en banc*).

Automatic Transmissions, Inc. v. Tayloe, 67 F. R. D. 440 (E. D. Pa. 1975); *Cutner v. Fried,* 373 F. Supp. 4, 12-13 (S. D. N. Y. 1974); *Professional Adjusting Systems, Inc. v. General Adjusting Bureau, Inc., supra; Siegel v. Realty Equities Corp. of New York,* 54 F. R. D. 420, 427 (S. D. N. Y. 1972); *Illinois v. Harper & Row Publishers, Inc., supra; Contract Buyers League v. F & F Investment,* 48 F. R. D. 7 (N. D. Ill. 1969); *Minnesota v. United States Steel Corp., supra.*

In antitrust actions damages need not be exact *Bigelow v. RKO Radio Pictures, Inc.,* 327 U. S. 251, 264 (1946); *Richfield Oil Corp. v. Karseal Corp.,* 271 F. 2d 709, 713-716 (9th Cir. 1959), *cert. denied,* 361 U. S. 961 (1960), and are usually measurable by a simple statistical formula. *Barr v. WUI/TAS, Inc.,* 66 F. R. D. 109 (S. D. N. Y. 1975); *In Re Antibiotic Antitrust Actions,* 333 F. Supp. 278, 289 (S. D. N. Y. 1971).[22]

In *Bray v. Safeway Stores, Inc., supra,* the court observed:

> "The defendant argues further that the across the board 20 cent figure fails to take into account the prices actually received by the plaintiffs and ignores price fluctuations due to differences in time, location, quality, and type. There can be little doubt that the damage figure was based upon evidence reflecting national averages. However, when the national averages are compared with the prices actually received by the plaintiffs, it is apparent that the averages are representative within tolerable limits and are appropriate to utilize as standards for projection. The Court does not expect the plaintiffs to prove the exact loss suffered

22. A comprehensive analysis of proof of damage in antitrust price-fixing cases is found in *In Re Sugar Industry Antitrust Litigation, supra* at 71,338-71,339.

> on each sale; as noted above, such a requirement would place upon the plaintiffs an impossible burden. The 20 cent figure constitutes an average flexible enough to account for the variations discussed by the defendant." 392 F. Supp. at 864.

CONCLUSION.

For the reasons set forth, the Petition of Mercedes-Benz of North America, Inc. and Daimler-Benz A. G. for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit should be denied.

Respectfully submitted,

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DATED: May 4, 1977.

APPENDIX.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT.

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 19th day of June, one thousand nine hundred and seventy-five

Gilbert Tucker, Lucille Tucker, Larry Krutick, Edwina Krutick, Moses Katcher, Albert Segal and Adelaide Segal,

Plaintiffs-Respondents,

v.

Arthur Andersen & Company,

Defendant-Petitioner.

Arthur Andersen & Company,

Defendant and Third Party Plaintiff-Petitioner,

v.

Joseph A. Bonura, Empire National Bank (as successor in interest to County National Bank), Lynda Dick, Executrix of the Estate of Jack R. Dick and Herman L. Meckler,

Third-Party Defendants-Respondents.

It is hereby ordered that the motion made herein by counsel for the petitioner dated June 2, 1975 for leave to

appeal under 28 U. S. C. 1292(b) be and it hereby is denied.

WILFRED FEINBERG,
Wilfred Feinberg,
JAMES L. OAKES,
James L. Oakes,
ELLSWORTH A. VAN GRANFEILAND,
Ellsworth A. Van Granfeiland,
Circuit Judges

IN THE

Supreme Court of the United States

October Term, 1976.

No. 76-1356.

MERCEDES-BENZ OF NORTH AMERICA, INC. and DAIMLER-BENZ A. G.,

Petitioners,

v.

JULES LINK and SOLOMON KATZ, on Behalf of Themselves and All Others Similarly Situated,

Respondents.

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF STATUTORY CERTIORARI, AND, IN THE ALTERNATIVE, FOR A WRIT OF COMMON LAW CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AND MOTION FOR LEAVE TO FILE PETITION.

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DATED: MAY 19, 1977.

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REPLY TO BRIEF IN OPPOSITION TO PETITION FOR STATUTORY CERTIORARI, AND, IN THE ALTERNATIVE, FOR A WRIT OF COMMON LAW CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AND MOTION FOR LEAVE TO FILE PETITION.

Respondents' Brief is a veritable catalogue of errors and misstatements, both of the facts of this case,[1] and of of the law applicable thereto.[2] It is an argument on the merits and treats in only a cursory fashion whether or not certiorari should be granted.

1. A principal contention of Respondents, that this Court is precluded from reviewing the refusal of a court of appeals to entertain a § 1292(b) appeal on the basis of

1. Respondents misstate their own complaint by stating that only "certain" dealers are alleged to have conspired (Respondents' Brief at 2). The complaint, however, alleges that all dealers conspired (R. 7a). Also, their assertion that there are 26,000 items and fewer parts (Respondents' Brief at 3) is erroneous; there are 49,000 items and 26,000 *different* parts (R. 207a *et seq.*).

Respondents also conveniently overlook the fact that Mercedes, in accordance with its warranty obligations, is the largest single purchaser of services from dealers under the warranty repair labor time guides which Respondents imply is an instrument to fix the price of non-warranty repairs above competitive levels. Thus, under Respondents' theory, Mercedes is the chief victim of its own conspiracy.

Respondents further mistake the issues involved. Respondents' assertion that "markups are pronouncedly consistent" (Respondents' Brief at 3), while superficially appealing in its simplicity, is in fact irrelevant. Respondents cannot establish liability under § 4 of the Clayton Act by showing that "markups are pronouncedly consistent" even if they prove a conspiracy to fix prices. They must prove that the price for each part exceeded the price each member of the class would have paid absent a conspiracy. Furthermore, the amount of any excess of the price actually charged, if any, will vary for different parts, in different markets, at different times, for different dealers, regardless of what the "markups" may be.

2. For example, Respondents rely heavily on selected lower court decisions on the issues which Petitioners have asked this Court to review, and fail to acknowledge the plethora of lower court decisions contrary to their view. The very existence of these conflicting lower court decisions on issues which this Court has never addressed should impel the Court to grant certiorari.

Liberty Mutual Insurance Co. v. Wetzel, 424 U. S. 737 (1976) (Respondents' Brief at 1, 8), is a gross misstatement of the holding in that case. There is no support in *Liberty Mutual* or any other case for the incredible proposition that this Court is foreclosed from giving guidance to lower courts on the proper interpretation of an act of Congress merely because the act vests in them some measure of discretion. *See Pittsburgh Plate Glass Co. v. United States*, 360 U. S. 395 (1959), wherein this Court reviewed the decision of a lower court for an abuse of discretion where the issue involving the Federal Rules of Criminal Procedure was entrusted "to the discretion of the trial judge." 360 U. S. at 399.

Petitioners seek this Court's review, not of the exercise of discretion by the court of appeals in considering § 1292(b) appeals, but of that court's misdefinition or overly restrictive interpretation of the legal framework (i.e., controlling question of law) within which it may exercise such discretion (Petition at 12-17). *See Fallen v. United States*, 378 U. S. 139 (1964). In providing guidance this Court can and should reject formulations of lower courts which it finds to be in error, even in cases where broad discretion, exercised in the absence of erroneous formulation, would have been permitted. *See Coleman v. Paccar, Inc.*, 424 U. S. 1301 (1976) (Rehnquist as Circuit Justice).

2. Respondents argue that class certifications are never reviewable since they are conditional and discretionary, and that any contrary view would "make a mockery of the 'final judgment' rule" (Respondents' Brief at 9). Their view would emasculate § 1292(b), which is a congressionally mandated exception to the final judgment rule, and which was adopted at the urging of the judiciary (Petition at 13-14). The very issue raised by this Petition is the proper interpretation of that act.

3. Respondents appear to excuse the failure of the district court to make the findings specifically required by Rule 23[3] (Petition at 10) by the bootstrap argument that a class action determination in itself is the only required finding (Respondents' Brief at 10). However, Respondents avoid two of the crucial issues which Petitioners ask this Court to review and decide: first, that class action representatives must demonstrate compliance with Rule 23 *before* certification (Petition at 25 *et seq.*); and, second, that district courts must make detailed findings *before* certification (Petition at 21 *et seq.*). Further, Respondents take the untenable position that Rule 23 findings are factual only. This Court previously rejected such simplistic formulations of complex factual-legal questions when it held:

> "That great weight is to be given to the findings of fact by the two lower courts is a rule of wisdom in the exercise of the reviewing power of this Court. But in the enforcement of the rule it is important to discriminate between more or less subordinate facts leading to a judgment of their legal significance, and a conclusion—though concurred in by two courts—that may in fact imply a standard of law on which judgment on the case in its entirety is based. *Baumgarter v. United States*, 322 U. S. 665, 670, 671, 88 L. ed. 1525, 1529, 1530, 64 S. Ct. 1240; *United States v. Appalachian Electric Power Co.*, 311 U. S. 377, 403, 404, 85 L. ed. 243, 250, 251, 61 S. Ct. 291." *Offutt v. United States*, 348 U. S. 11, 15 (1955).

3. All references to Rule 23 are to the Federal Rules of Civil Procedure. See the dissenting opinions of Judges Van Dusen and Gibbons (Op. A41 *et seq.*; Op. A44 *et seq.*).

A basic function of appellate courts is to review the application of law to facts. The factual determinations of Rule 23 are, at a minimum, ultimate questions of fact, the resolutions of which become standards of law by which other class action motions are evaluated.

Early review of large class determinations by appellate courts is particularly appropriate (Petition at 14-17) and this Court should now determine the standards which district courts must apply in determining the typicality, commonality, and manageability requirements of the Rule.[4] It is "[t]he importance of the administration of the Federal Rules of Civil Procedure, together with the uncertainty existing on the issue among the Court of Appeals," *La Buy v. Howes Leather Co.*, 352 U. S. 249, 251 (1957), which necessitates that this Court grant certiorari.

4. Respondents argue that since a class determination "may" be "conditional," any class action determination is inappropriate for § 1292(b) review (Respondents' Brief at 6, 9). Petitioners do not dispute that a court may "conditionally" certify a class which it has determined meets the requirements of Rule 23. However, the court, as it did in this case, may not "contingently" certify a class with the speculative expectation that plaintiffs may later meet their burden under Rule 23 (Petition at 20-21). This court should now definitely require that class action representatives meet their burden before certification.

5. Respondents' argument that "the district court did not order a bifurcated trial of liability and damages before separate juries" (Respondents' Brief at 14) is beside the

4. Respondents erroneously state that the first question certified by the District Court under § 1292(b) was "numerosity". Actually numerosity (whether the class is too numerous to permit joinder) has never been at issue. The court of appeals erroneously characterized the first question as manageability (Op. A28), which it considered "primarily a factual one . . ." (Op. A32). However, the question certified was whether the district court's class action determination was proper given the factual matrix of this case (A2).

point because in any event, as noted by all four dissenters in the court of appeals, the "assumed propriety" of such procedure was one of the "prime predicates" of the district court's class determination (Op. A40); (Petition at 25-26). Respondents' reliance on *Government & C. E. O. C., CIO v. Windsor*, 353 U. S. 364 (1957) and dictum in *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U. S. 123 (1950), for the proposition that the issue is conjectural is entirely misplaced in that *Windsor* related to a federal court's refraining from constitutional decisions pending determination of local law questions by a state court, and *McGrath* concerned review of action by a coordinate branch of government.

The Seventh Amendment issue is before this Court, as it was in *Dairy Queen v. Wood*, 369 U. S. 469 (1962) and *Ross v. Bernhard*, 396 U. S. 531 (1970), and should be now reviewed.

6. Respondents have completely inverted the standard set forth by this Court in *Gasoline Products v. Champlin Refining Co.*, 283 U. S. 494 (1931), in declaring that it permitted partial retrial "unless the issue to be retried is inseparably interwoven with the remaining issues" (Respondents' Brief at 16). To the contrary, *Gasoline Products* held that partial retrial was impermissible "unless it clearly appears that the issue to be retried is so distinct and separable from the others that a trial of it alone may be had without injustice." 282 U. S. at 500. Petitioners ask the Court to decide whether, in this case or any § 4 *Clayton Act* case in which liability and damages are completely intertwined (Petition at 27-28), a bifurcated trial of those issues before separate juries is permissible.[5]

5. Unless the issues of liability and damages are tried before the same jury, the proof of "fact of injury" or "damage" to establish liability, and the proof to establish the "amount of such injury" or "damages" would so overlap that the second trial would be but a retrial of the first with the risk of inconsistent verdicts.

CONCLUSION.

Petitioners contend that the district court erred in certifying a 300,000 member nationwide class where the proof of injury will vary for each member of the class and where the basis for such certification was the assumed propriety of the use of separate juries for the determination of liability and damages. The lower court's decision in this case presents to this Court for its determination, the authoritative interpretation of the requirements of Rule 23. The Court's definitive guidance is needed to end the chaos produced by the myriad of conflicting lower court decisions, which can only be rationalized on the basis of the individual court's opinion as to the social desirability of class actions.

This case also presents an opportunity for the Court, to interpret the Interlocutory Appeals Act of 1958, 28 U. S. C. 1292(b) and remedy the uncertainty pertaining thereto, an uncertainty demonstrated by the internal conflict within the court of appeals in this case.

For the reasons set forth in the Petition and in this Brief, the Petition for Certiorari should be granted.

Respectfully submitted,

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